Supreme Court, U.S.
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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

DANNY L. RUSSELL,
Petitioner,

v.

PLANO BANK & TRUST,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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March 19, 1998

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit erred in ruling that there was no error in the district court's jury instruction on the definition of a "qualified individual with a disability."

2. Whether the Fifth Circuit's ruling that Russell did not make a proper objection to the district court's jury instruction under Rule 51 results in a conflict among the circuits.

3. Whether the Fifth Circuit incorrectly applied Rule 51 to Russell's objections to the district court's instruction on the definition of "qualified individual with a disability."

LIST OF PARTIES

The parties before the court of appeals and this Court are listed in the caption.

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PETITION FOR WRIT OF CERTIORARI

Danny L. Russell prays for a writ of certiorari to review the opinion and order of the United States Court of Appeals for the Fifth Circuit, rendered in these proceedings on December 19, 1997.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals was issued on December 19, 1997, and is reported at 130 F.3d 715. It is attached hereto in the Appendix (App. at 1a). The district court issued its Amended Final Judgment on August 23, 1996. (App. at 41a).

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) to review a decision of the United States Court of Appeals for the Fifth Circuit by writ of certiorari after rendering judgment. The decision for which review is sought was entered on December 19, 1997.

STATUTES INVOLVED

Relevant portions of the Americans With Disabilities Act ("ADA"), as amended, 42 U.S.C. § 12101 *et seq.*, are set forth below:

§ 12102. Definitions

As used in this chapter:

* * * *

(2) Disability

The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

* * * *

§ 12111. Definitions

As used in this subchapter:

* * * *

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or

without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation

The term "reasonable accommodation" may include—

(A) making existing facilities by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examination, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

* * * *

Relevant portions of the Federal Rules of Civil Procedure are set forth below:

Rule 51. INSTRUCTIONS TO JURY: OBJECTIONS

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury.

> The court, at its election, may instruct the jury before or after argument, or both. No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection out of the hearing of the jury.

STATEMENT OF THE CASE

A. Nature of the Case and Proceedings Below

Danny L. Russell (hereinafter referred to as "Russell") filed his original complaint on May 19, 1995, alleging that Plano Bank & Trust (hereinafter referred to as "PB&T") discriminated against him in violation of the ADA in failing to provide a reasonable accommodation and in ultimately terminating his employment. On June 12, 1997, the jury returned a verdict that Russell was not a "qualified individual with a disability." On August 23, 1996, the district court entered an Amended Final Judgment, ruling that Russell take nothing on his claims in this case.

Russell appealed the court's take nothing judgment, contending that the district erred in giving the jury an instruction that defined "qualified individual with a disability" without including the reasonable accommodation language from the definition of "qualified individual with a disability" contained in the ADA statute at 42 U.S.C. § 12111(8). On December 19, 1997, the Fifth Circuit issued its opinion, which affirmed the judgment of the district court. Specifically, the Fifth Circuit ruled that the district court's instruction to the jury which did not contain the reasonable accommodation language from the ADA statute was not erroneous, and that Russell's objection to the district court's instruction was not sufficient under Rule 51 of the Federal Rules of Civil Procedure.

B. Factual Background

1. *Russell's Employment with PB&T.*

Russel became employed with PB&T in August 1990 as Vice President of Loans. Russell remained in this position until 1985, when PB&T opened its first branch location, and Russell became Branch Manager over this new bank. From 1980 to 1985, Russell aways received good feedback concerning his performance, and received raises and bonuses.

In 1987, Russell transferred back to the Bank's main location at the request of the Chairman of the Board, Gene Catalano, who had asked Russell to be his assistant. Catalano had approximately seventy percent (70%) of the Bank's entire loan portfolio. Catalano needed help to follow through on all the loans that he was granting and to collect the loans which had already been granted. Russell performed in this position for several months. During this time, Russell began formulating a method for collection of loans, and began to realize the seeds of the Special Assets Department. The Special Assets Department was carved out of Catalano's portfolio, which was in need of immediate and intense collection efforts. Eventually, an outside consultant recommended that PB&T establish a department that would only perform problem loan collections. Accordingly, the Special Assets Department was established in 1987. Initially, Gary Flowers was the head of the Special Assets Department, and Russell reported directly to him. After Flowers was terminated after three to five months, Russell became the head of the department.

By the end of 1990, the probem loans within PB&T was decreasing. In 1988, there was a total of $29,930,000 in classified or problem loans. By the end of 1990, classified loans decreased to approximately $21 million. Russell received positive feedback as a result of his performance in Special Assets during this time period. In March 1990, Russell received an outstanding performance award from the President of PB&T, Doug Myers, along with a bonus

for his work. On November 5, 1991, PB&T gave Russell an exempt employee performance appraisal. In this appraisal, Russell was rated as exceeding expectations, which is the highest rating that a Bank employee can receive.

2. Russell's Conversations with Chase Regarding Another Position.

In November 1991, Russell had a conversation with his supervisor, Jeffrey Chase, about the possibiity that at some point in the future the Special Assets Department would eventually be disbanded. Chase stated that he and Russell needed to talk about where Russell thought he may be interested in going when the Special Assets Department disbands. At no time during this conversation did Chase ever say that once the Special Assets Department was eliminated that there was a possibility PB&T would lay Russell off. Indeed, Chase testified that he specifically mentioned loan review as a potential job for Danny to go into when Special Assets disbanded. Chase stated that at no time was he thinking in terms of a termination, but rather than Russell would move into some other position. At the end of the conversation, Russell said that he would think about it and get back to Chase about what kind of job Russell wanted when Special Assets Department disbanded.

Chase and Russell had another conversation in the spring of 1992 concerning what position Russell might be interested in after the Special Assets Department closed in the future. Chase and Russell talked about combining the Special Assets Department with the Loan Review Department, in which Russell would still do Special Assets, help out in Loan Review, and manage the newly formed department. Russell told Chase that he thought that that was a good idea.

3. Russell's Car Accident and Injuries.

On August 4, 1992, Russell was en route on bank business when he was involved in a car accident. Soon

after the car accident, Russell began having episodes of uncontrollable shaking, which became more frequent and more intense. Although Russell was having seizure-like episodes, he initially attempted to work full-time. Starting in September, however, because of his continuing symptoms, he started working halftime. Finally, on September 28, Russell had a seizure while he was at work. Before Russell went to the hospital, Doug Myers, PB&T's President, told Russell to get himself well, and not to worry about his job, that it would be here when he gets back. Due to the fact that Russell was continuing to have seizures, and they were getting worse, Russell finally went to a neurologist specializing in brain trauma, Dr. John Paul Krusz. Dr. Krusz diagnosed Russell with a brain injury, also known as a post-concussional late effect brain injury. Once Dr. Krusz diagnosed Russell, Dr. Krusz gave him anti-seizure and other medication to help with the symptoms he was experiencing. On October 13, Dr. Krusz informed Russell that it was not advisable that he return to work. Russell promptly informed Chase that he had been to the doctor, that he was on medication, and that his doctor had advised him that he should not return to work at that time.

Richard Fulbright, a clinical neuropsychologist, also treated Russell. Fulbright's speciality is working with people with brain injuries. On October 28, 1992, Fulbright performed a neuropsychological evaluation on Russell. The purpose of the evaluation was to objectively document and measure the effects of the brain injury on Russell's thinking abilities. Fubright's overall finding was that Russell was having difficulty in a variety of areas with respect to his thinking abilities. Although Russell's degree of impairment was significant, Fulbright stated in the evaluation that it was suspected that Russell would be able to show some significant gains, including a partial return to work, within about a three month period following intensive treatment. Fulbright testified that he felt that Russell had a good prognosis for being able to get back to work.

During an intensive three month period from October to December 1992, Fulbright retrained Russell with respect to Russell's learning skills.

4. *The December 15 Meeting and its Aftermath.*

On December 15, 1992, Russell, his wife, and Richard Fulbright met with Jeff Chase to discuss Russell's medical condition and the criteria for Russell's return to work. During the meeting, Fulbright explained to Chase the types of problems that Russell was having and how it was likely to affect his performance on the job. Fulbright and Chase then worked on a plan for Russell to return to work and gradually re-enter the workplace. At this meeting, it was agreed that Russell could return to work for one and a half hours a day until Russell was able to build his cognitive skills up to more hours. Dr. Fulbright stated that Russell could work one and a half hours a day and that Russell could increase the number of hours he worked over a period of time. Dr. Fulbright informed Chase that Russell could return to work in the second full week of January 1993. During the meeting, Chase reacted very favorably to the news that Russell could return to work for one to two hours per day.

Although Chase had reacted favorably to allowing Russell to return to work for one to two hours a day at the December 15, 1992 meeting, the conditions for Russell's return were changed after Chase returned to the Bank. Specifically, Chase had a meeting with Doug Myers, the Bank's President, and Oliver Rose, the Human Resources Manager, and described the meeting between Fulbright, the Russells, and himself. At the meeting, Rose raised the question of whether the Bank should make a reasonable accommodation under the ADA. Rose questioned whether Russell working an hour and a half per day would meet the requirements of doing the main functions of the job. Rose felt that this was not reasonabe and he would not be doing the major functions of the job. After discussing

the essential functions of the job, Chase, Rose, and Myers decided that a reasonable accommodation was for Russell to work four hours a day, which would allow him to perform the essential functions of the position. Thus, on December 28, 1992, Chase wrote Dr. Fulbright a letter informing him that the Bank could not allow Russell to return to work for one to two hours per day, but that the Bank could reasonably accommodate Russell's disability if he could work four hours per day:

> We believe that it would be a reasonable accommodation to restructure the job to a minimum of four hours per day as we have done in the past for Danny. This would enable him to complete the essential functions of the job.

5. The January 19 Meeting.

As a result of the Bank's change of heart, Russell requested another meeting. Another meeting was held on January 19, 1993. In addition to the persons who were present at the previous meeting, Oliver Rose was also present. The Bank reiterated its requirement that Russell would not be able to come back to work on less than a four-hour-a-day schedule. Chase and Rose stated that they had a precedent of other workers who had been ill coming back to work for four hours a day, and that was the Bank's criteria. Although Dr. Krusz had granted a release for Russell to return to work for four hours per day as of December 1992, Dr. Fulbright, however, felt that four hours per day was more than Russell could handle and that Russell could possibly be fired for performance reasons if he tried to work four hours a day. Fulbright suggested to Rose and Chase that if Russell could not ease into work on the job on a gradual basis and gradually increase his workoad, the only other option would be a more expensive and aggressive rehabilitation program. Thus, shortly after the meeting, Fulbright recommended a rehabilitation program that could provide Russell with the type of training which could increase his cognitive endurance to the mini-

mum of four hours per day. Fulbright referred Russell to PATE Rehabilitation, which is an outpatient day program for people who have suffered head injuries. PATE works on rehabilitating peoples thinking abilities so that they can return to work.

6. ***Russell's Rehabilitation and the Meeting of the Requirements for His Return to Work.***

Russell commenced going to PATE Rehabilitation on February 14 or 15, 1993, and was enrolled there for approximately six months. While at PATE, Russell worked on job-related skills and Bank issues, similar to his responsibilties at PB&T. By the end of Russell's treatment at PATE in late June, Russell was up to five or six hours of productive work per day. On July 7, 1993, Russell was discharged from PATE Rehabilitation. Once PATE discharged him, Russell considered himself ready to return to work for four hours per day. All of his treating physicians knew that the goal of treatment for Russell was to meet the criteria of a minimum four hours a day. At no time did any doctor or any other person say that Russell could not go back to work for four hours a day in July 1993. Indeed, as of July 1993, Fulbright was confident that Russell could work for Plano Bank & Trust at four hours per day. PATE Rehabilitation also determined that Russell was able and ready to go back to the essential functions of his position with PB&T within the limited work schedule of four hours per day. The Bank had also acknowledged that Dr. Krusz had previously released Russell to return to work for four hours per day.

7. ***The July 10 Meeting.***

On July 10, 1993, Russell, along with his wife and rehabilitation nurse, Kay Connolly, met with Jeff Chase and Oliver Rose. Russell informed them that he was released from PATE Rehabilitation and could meet PB&T's previously-set criteria for returning to work for four hours

per day. Thus, Russell had met the requirements the Bank gave him for returning to his job in July 1993. However, after Russell informed the Bank that he could return to work for four hours a day, Chase and Rose, for the very first time, informed Russell that they were not sure whether there was a position for Russell at the Bank. Chase told Russell that he was glad that Russell was feeling better but that he wanted Russell to know that he was not real sure that there was a place for Russell to return to work. Chase informed Russell that the Special Assets Department was doing well in reducing loans and that they were not sure that there was a position for Russell. Chase and Rose stated that PB&T was going to eliminate the Special Assets Department. At the conclusion of the meeting, Chase and Rose told Russell that they were going to return to the Bank and see if there was a position available for Russell.

8. ***The August 5 Meeting.***

Russell again met with Chase and Rose on August 5, 1993. At this meeting, Chase informed Russell that he had looked through the Bank and had not found another position for Russell. Chase told Russell that PB&T had come up with a severance package, but that Russell would have to sign a release to obtain it. After Russell refused to sign the release, Rose gave him a termination letter on October 26, in which Rose stated that the Bank had continued to look for a position for Russell but that there was nothing available. The letter went on to state that the Bank was terminating Russell effective October 31, 1993. Although the letter specifically stated that the Bank continued to look for a position for Russell until the date of the letter, Chase admitted that "we stopped looking after we had the meeting with him on August the 5th."

9. ***Inconsistencies, Pretext, and Disparate Treatment.***

There are numerous inconsistencies with the Bank's contention that the Special Assets Department was being

eliminated and that the Bank did not have a position for Russell. First and foremost, in the conversations between Russell and Chase prior to Russell's injury concerning the type of position Russell would like to have once the Special Assets Department went away, at no time did Chase inform Russell that there was any chance that he could be terminated or laid off if there was not a position available. Second, immediately before Russell sustained his head injury, Russell was working more than forty hours per week. At that time, the Bank's classified loan portfolio was down to two million dollars ($2,000,000). As of the July 1993 meeting in which Chase and Rose told Russell that the Special Assets Department was going to be eliminated, classified loans had increased to four million dollars ($4,000,000). Thus, when the department was actually disbanded in 1993, the classified loans (for which the Special Assets Department was responsible) was more than double what it was when Russell was working more than forty hours per week before his car accident. If Russell was busy enough to work more than forty hours per week when classified loan was at a total of two million dollars ($2,000,000), then surely Russell had enough to keep him busy on a four hour per day basis in 1993, when classified loans went up to four million dollars ($4,000,000).

There are even more reasons showing the pretextual nature of the Bank's contention that it did not have a position for Russell. When Chase and Rose informed Russell that the Special Assets Department was going to be eliminated, Russell called his secretary, Nidza Aguilo, and asked her what she knew about the closing of the Special Assets Department. Aguilo told Russell that she was shocked about this news and that she had not heard anything about the closing of the Special Assets Department. Additionally, despite the fact that Russell's absence placed additional responsibilities on Chase, and that he wanted Russell to return to employment to help allegedly wind down the Special Assets Department, PB&T did not

allow Russell to return to work during the six weeks after the July meeting in which the department officially wound down.

Further reasons showing the disparate treatment between Russell and other non-disabled persons is the fact that between January 1, 1993 and January 3, 1994, PB&T had eliminated four jobs. Russell was the only person whose job was eliminated that did not receive a transfer to another position. Indeed, despite the fact that Russell was terminated, the only other person in the Special Assets Department, Nidza Aguilo, was transferred to another department within PB&T. In fact, Aguilo informed Russell that there were new people being hired for a new branch that the Bank was planning on opening.

10. *Russell's Current Position.*

Russell currently works as a private investigator for Del R. Vandiver and Associates approximately twenty to twenty-five hours per week. Russell commenced working for Vandiver in September 1994. Vandiver testified that Russell performed very well, and that he never had a problem not being able to do the job when he was working twenty to twenty-five hours per week. Both Drs. Fulbright and Krusz were aware that Russell is currently employed by Vandive & Associates and working twenty to twenty-five hours per week. Neither doctor has objected to Russell working those hours. Indeed, both Krusz and Fulbright encouraged Russell to return to work for four hours per day.

REASONS FOR GRANTING THE WRIT

There are special and important reasons for granting Russell's Petition for Writ of Certiorari. The Fifth Circuit has decided an important question of ADA law that has not been, but should be, settled by this Court. Specifically, the ADA requires employers to provide reasonable accommodations to individuals with disabilities so that they may perform their jobs. In this regard, the ADA

differs from other discrimination statutes in that it does not merely mandate equality of treatment, but special treatment in terms of reasonable accommodations. The Fifth Circuit's decision that the district court did not err in giving a jury instruction which excluded the term "with or without a reasonable accommodation" from the definition of "qualified individual with a disability" completely obliterates the heart and soul of the ADA.

Additionally, this petition should be granted because the Fifth Circuit decision concerning F.R.C.P. 51 objections to jury instructions is in conflict with the decision of another United States court of appeals on the same important matter. Specifically, the Fifth Circuit ruled that Russell's objections to the district court's instructions to the jury were not sufficient in the face of the district court's specific reference on the record that to the extent Russell's requested instructions were not given in the court's charge, they were refused.

I. THIS COURT SHOULD REVERSE THE FIFTH CIRCUIT'S DECISION AND SETTLE THE VITALLY IMPORTANT ISSUE OF ADA LAW CONCERNING THE DEFINITION OF A "QUALIFIED INDIVIDUAL WITH A DISABILITY"

A. Applicable Law on "Qualified Individual With a Disability."

The ADA defines a "qualified individual with a disability" as follows:

> The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.

42 U.S.C. § 12111(8).

The EEOC Interpretive Guidance provides that an individual with a disability is "otherwise qualified" if he

or she is qualified for a position but, because of a disability, he or she needs a reasonable accommodation to be able to perform a job's essential functions. 29 C.F.R. § 1630.2(m). Under those circumstances, an employer would be obligated to provide a reasonable accommodation to enable the person to be able to perform the job's essential functions. *Id.*

The statute specifically references the types of reasonable accommodations which are appropriate:

> The term 'reasonable accommodations' may include—
>
> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
>
> (B) *job restructuring, part-time or modified work schedules*, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examination, training materials, or policies, the provisions of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. § 12111(9) (emphasis added).

Although the list is inclusive of possible reasonable accommodations, it is by no means exhaustive. 29 C.F.R. § 1630.2(o).

An accommodation is defined as "any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities." 29 C.F.R. § 1630.2(o). The reasonable accommodation requirement is intended as a vehicle to remove or alleviate barriers to equal employment opportunities for individuals with disabilities. *Id.* These barriers could be . . . "rigid work schedules which permit no flexibility as to when work is performed or breaks taken. . . ." *Id.* To ascertain the appropriate

accommodation that is effective for the individual, the employer may have to initiate an "informal, interactive process with the qualified individual with a disability in need of the accommodation." *Id.*

The ADA statute and EEOC regulations specifically provide that an employer may reasonably accommodate an individual with a disability by providing for part-time or modified work schedules. 29 C.F.R. § 1630.2(o). The importance of this accommodation is reflected by the EEOC's observation in its Technical Assistance Manual that many people with disabilities are fully qualified to perform jobs with the accommodation of a modified work schedule. *See Technical Assistance Manual on the* Employment Provisions (Title I) of the Americans with Disabilities Act, Equal Employment Opportunity Commission, Section 3.10(III) at III-22 (January 26, 1992). The Manual recognizes that some people cannot work a standard nine to five work day or a standard Monday-Friday work week. *Id.* The EEOC Technical Assistance Manual also provides that people whose disabilities may need modified work schedules include . . . "people who need rest periods . . ." Technical Assistance Manual at III-23.

B. Russell's Proffered Instruction Correctly Stated The Law.

There can be no dispute that Russell's proffered instruction correctly stated the law concerning the definition of a "qualified individual with a disability." The instruction correctly tracks the definition of a "qualified individual with a disability" as stated in 42 U.S.C. § 12111(8), as well as the EEOC Regulations and interpretive Guidance. It is plainly apparent that a disabled person must be reasonably accommodated if it would allow him to perform a job's essential functions. The Fifth Circuit acknowledged that Russell's proffered instruction correctly stated the law:

> "As Russell's proffered instruction tracked the language of the ADA, there is no question that it was a correct statement of the law."

(Russell at 719).

C. The District Court's Instruction Constituted a Blatant and Fundamental Error.

There is no doubt that the district court's definition of "qualified individual with a disability" was purely and simply wrong. The court's instruction failed to make any mention of the fact that a disabled person may meet the definition of "qualified individuals with a disability" by showing he can perform the essential functions of the position *with a reasonable accommodation.* The failure of the district court to include the reasonable accommodation language tainted the jury's response to Interrogatory No. 1 of the verdict form. (App. at 38a).

In *Riel v. Electronic Data Systems Corporation*, 99 F.3d 678 (5th Cir. 1996), the Fifth Circuit emphasized the critical importance that reasonable accommodations play in the ADA:

> The ADA mandate that employers must accommodate sets it apart from most other anti-discrimination legislation. Race discrimination statutes mandate equality of treatment, in most cases prohibiting consideration of race in any employment decision. In contrast, an employer who treats a disabled employee the same as a non-disabled employee may violate the ADA. By requiring reasonable accommodation, the ADA shifts away from similar treatment to different treatment of the disabled by accommodating their disabilities.

Riel at 681.

As the Fifth Circuit in *Riel* has so aptly described, the ADA's heart and soul is the requirement to reasonably accommodate a disabled individual. The court's failure to instruct the jury on the fact that a disabled person may

need a reasonable accommodation to perform the essential functions of the position flies in the face of the ADA's intent, purpose and scheme. Thus, it is quite clear that the failure of the court to include reasonable accommodation language in the definition of a "qualified person with a disability" created substantial and ineradicable doubt whether the jury was properly guided in its deliberation as to whether Russell was a "qualified individual with a disability."

D. The Erroneous Instruction Affected the Outcome of the Case.

In this litigation, the erroneous instruction concerning the definition of a "qualified individual with a disability" clearly affected the outcome of the case. This entire case revolved around the issue of whether Russell could perform the essential functions of his job *with a reasonable accommodation*. PB&T itself framed the issue when it stated, in writing, that it could reasonably accommodate Russell's disability if he could work four hours a day. In a December 28, 1992 letter from Chase to Fulbright, the Bank proposed a reasonable accommodation as follows:

> We believe that it would be a reasonable accommodation to restructure the job to a minimum of four hours per day as we have done in the past for Danny. This would enable him to complete the essential functions of the job.

There was never a time during this entire litigation in which the reasonable accommodation of working four hours per day was not at the heart of the case. It was certainly not Russell's contention that he could perform his job without the reasonable accommodation of a modified work schedule of four hours per day.

When it came time to deliberate, however, the jury was not given the opportunity to consider that Russell could be a qualified individual with a disability even

though he needed a reasonable accommodation of a modified work schedule of four hours per day. For the seven months from the time the Bank informed Russell that he would have to work four hours a day before he could return to work, Russell put all his efforts into meeting this accommodation. After going through intense rehabilitation at PATE Rehabilitation, and receiving a discharge from PATE to return to work, and with the full support and encouragement of his doctors, Krusz and Fulbright, in July 1993 Russell could perform the essential functions of his position *with the reasonable accommodation of working four hours per day*. Since the jury was not properly instructed concerning Russell being able to prove that he was a "qualified individual with a disability" with the reasonable accommodation of working four hours per day, the erroneous instruction undoubtedly affected the jury's answer to Interrogatoy No. 1. As the jury was instructed to stop answering any more interrogatoies because of its negative answer to the first interrogatory, the tainted answer resulted in an improper judgment for PB&T. The very essence of the ADA is the fact that individuals with a disability have the right to a reasonable accommodation. The jury in this case was not allowed to consider this important fact as a direct result of the district court's erroneous instruction.

In its opinion, the Fifth Circuit acknowledged that "Russell's preferred instruction tracked the language of the ADA," and that there "is no question that it was a correct statement under the law." *Russell* at 719. The Fifth Circuit, however, ruled that the instruction was not erroneous because the jury instructions mentioned the words "reasonable accommodation" in another section of the instruction. *Id.* at 721. There is one overwhelming problem with the Fifth Circuit's reasoning. Since the court's definition of "qualified individual with a disability" did not include the term "with or without reasonable accommodation," the jury would not have been in a position to consult the definition of reasonable accommodation

in determining the question of whether Russell was a "qualified individual with a disability."

The Fifth Circuit's opinion in essence means that the reasonable accommodation requirements of the ADA are meaningless. Most disabled persons need reasonable accommodations to perform the essential function of their positions. The Fifth Circuit's ruling turns the ADA on its head. Without the requirement of reasonable accommodations, there is nothing left to the ADA. The Fifth Circuit's ruling in this ADA case would be equivalent to ruling in an age discrimination case that the jury does not have to be instructed that the age discrimination laws apply to persons forty years or older.

This Court has not ruled on ADA issues since the enactment of the ADA in 1992. This case would serve to settle the most important question under the ADA laws, the requirement of reasonably accommodating disabled persons. Accordingly, this Court should grant Russell's Writ of Certiorari on this vital issue of ADA law.

II. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS CONCERNING RULE 51 OBJECTIONS AND CORRECT THE FIFTH CIRCUIT'S ERRONEOUS INTERPRETATION OF THIS RULE

In its opinion, the Fifth Circuit determined that Russell's objections to the court's jury instruction concerning the definition of "qualified individual with a disability" was "not specific enough to apprise the district court of this particular problem with the challenged instruction, and it therefore failed to satisfy the requirements of Rule 51." *Russell* at 720. As will be fully shown below, the Fifth Circuit's ruling that Russell's objection was insufficient is in conflict with the decision of another court of appeals on the very same important issue.

A. *Russell's Record Objections Were Valid.*

After the judge read the instructions to the jury, the district court asked for objections to the court's charge. At that time, Russell made the following objection:

> "Can we just have an objection that to the extent that the Plaintiff's requested instructions were not given, we would object on that ground."

In response, the district judge stated the following:

> Alright, Mr. Watsky. The objections will be overruled. And the court will state for the record to the extent the requested instructions of the Plaintiff were not substantially covered—given in the court's charge, they are refused. *Id.*

Based upon the statements of Russell's counsel and the court, it is clear that Russell properly preserved the court's failure to give his requested instruction concerning the definition of a "qualified individual with a disability."

In this regard, this case is similar to *Glover v. The BIC Corporation*, 6 F.3d 1318 (9th Cir. 1993). In *Glover*, the defendant sought a new trial "because the district court declined to give [the defendant's] requested instructions concerning [the plaintiff's] burden of proving [the defendant's] conduct was a 'substantial factor' in causing the fire." *Glover* at 1325. As in the present case, the plaintiff in *Glover* argued that the defendant was "precluded from raising this issue on appeal because it failed to properly object at trial." *Id.* The defendant had "neither objected to the alleged insufficiency of the causation instruction during the court's review of the instructions with counsel, nor raised an objection after the charge was read to the jury." *Id.* at 1326. The Ninth Circuit stated, however, that "following a short recess after its review of the final instructions with counsel, the district court noted for the record, 'I am considering each party has an exception for any requested instruction which the court did not give.'" *Id.*

The Ninth Circuit ruled that based upon these facts, the defendant had sufficiently preserved its appeal of the district court's failure to give the defendant's proposed causation instructions. *Glover* at 1327. The basis of the court's ruling was that (1) the defendant had "offered causation instructions, which were rejected by the court, that correctly stated the requirement of causation under Oregon law," and (2) "the district court informed [the defendant] that the court had noted for the record [the defendant's] objection to any requested instructions the court did not give." *Id.* The court of appeals then ruled that the "proposed instructions are accurate statements of the law which should have brought to the court's attention the failure of the general charge to adequately address the issue of causation." *Id.*

The facts in the present case are just as strong as the facts in *Glover*. It is beyond a doubt that Russell proposed a correct instruction concerning the definition of a "qualified individual with a disability." Additionally, as in *Glover*, the trial court specifically allowed Russell to object to the instructions to the extent that Russell's requested instructions were not given. Thus, on virtually the very same set of identical facts, the Ninth Circuit ruled that a party's objections were in compliance with F.R.C.P. 51, while the Fifth Circuit has ruled just the opposite. This is a clear conflict in the decisions of the courts of appeal on a very important issue of Rule 51 objections.

The Fifth Circuit acknowledged that "a party may be excused from the requirement of making a specific objection only where 'the party's position previously has been made clear to the trial judge and it is plain that a further objection would be unavailing.'" *Russell* at 720, 9A Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure* § 2553. The Fifth Circuit, however, held that Russell was not excused from the Rule 51 requirement because "there is no evidence in the record that Russell's position regarding the omission of the words

'with or without reasonable accommodation' from the paragraph defining qualified individual with a disability was made clear to the trial judge." *Russell* at 720.

Despite the Fifth Circuit's conclusory statement that Russell did not make it known to the court his position on reasonable accommodations, the record clearly shows that the trial court was well aware of Russell's position in this regard throughout the entire case. First and foremost, the court was well aware of Russell's position through the Bank's motion for summary judgment. The entire basis of the Bank's motion for summary judgment was that Russell was not a "qualified individual with a disability." The district court noted as much in its Memorandum Opinion and Order denying PB&T's motion for summary judgment when it stated that "the Bank argues that Russell was not a "qualified individual with a disability." Throughout Russell's brief in support of Russell's response to the Bank's motion for summary judgment, Russell emphasized that he must merely prove that he is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position." Furthermore, since the Bank's approach to this case was that Russell was not a "qualified individual with a disability" during the trial phase, Russell hammered, again and again, on the fact that he could perform the essential functions of his position with the reasonable accommodation of working four hours per day. Thus, there can be no dispute that Russell made the district court fully aware of Russell's position and that he did not need to present a further objection to the court's charge concerning the definition of a "qualified individual with a disability."

This Court should settle the conflict in the circuits in favor of the Ninth Circuit's holding in *Glover*. There can be no doubt that an objection to a jury instruction is sufficient under Rule 51 where the district court specifically gives its consent to a party to object to the court's

instructions to the extent they differ with the party's requested instructions of the party. This is especially true where a party has previously made it clear to the trial judge its position in connection with the instruction at issue.

CONCLUSION

For all of the reasons stated herein, Russell's Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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March 19, 1998

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 96-41007

DANNY L. RUSSELL,
Plaintiff-Appellant,

v.

PLANO BANK & TRUST,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Texas

Dec. 19, 1997

Before KING and JONES, Circuit Judges, and WERLEIN,* District Judge.

KING, Circuit Judge:

Plaintiff-appellant Danny L. Russell, appeals the district court's judgment, following a jury trial, in favor of defendant-appellee Plano Bank & Trust. Russell claims that the district court's jury instructions contained an incomplete definition of the term "qualified individual with

* District Judge of the Southern District of Texas, sitting by designation.

a disability" within the meaning of the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1994), which he argues was likely to have misled the jury. He therefore contends that he is entitled to a new trial. We affirm the judgment of the district court.

I. FACTUAL & PROCEDURAL BACKGROUND

Plaintiff-appellant Danny L. Russell was employed by defendant-appellee Plano Bank & Trust ("Plano Bank") from August 15, 1980, until his termination on October 31, 1993. Both parties agree that Russell was a valuable employee who received several promotions during his tenure at Plano Bank. In 1989, Russell received a promotion to the position of Vice-President and Special Asset Department Manager, and it is this position that he held at the time of his termination.

On August 4, 1992, Russell was involved in a motor vehicle accident that caused him to suffer neck, shoulder, and back injuries, as well as a "concussion post-late effect, also known as a brain injury." As a result of the accident, in September 1992 Russell began to experience "complex partial seizures." These seizures caused Russell to experience symptoms which included disorientation, muscle twitching in his extremities, blank staring, sensitivity to sound and light, irritability, and rage. Several weeks after the accident, Russell experienced one of these seizures while at work.

As a result of the seizures, Russell sought medical attention, and he was placed on disability leave while he underwent evaluation and treatment. During the fall of 1992, Russell began a rehabilitation program aimed at preparing him to return to work on a part-time basis. On December 15, 1992, Russell, his wife, and Dr. Richard Fulbright, Russell's treating neuropsychologist, met with Jeff Chase, Plano Bank's Executive Vice-President and Russell's supervisor, to discuss his condition and the possibility of his

return to work. The parties eventually agreed that Russell could return to his job when he was capable of working for at least four hours per day. Russell then enrolled in an intensive rehabilitation program that focused on teaching him job-related skills and allowed him to practice working on Plano Bank's own files.

The rehabilitation program discharged Russell on July 7, 1993, and he claims that as of that date he was ready and cleared by his physicians to return to work for at least four hours per day.[1] On July 10, 1993, Russell, along with his wife and his rehabilitation nurse, met with Chase and another Plano Bank representative. Chase informed Russell that Plano Bank was planning to eliminate the Special Assets Department and that he was therefore unsure whether there was a place for Russell at the bank. On August 5, 1993, Chase confirmed that he had been unable to find a position for Russell, and he offered Russell a severance package conditioned on Russell's signing a release of liability. In August 1993, Plano Bank disbanded Russell's department. Russell refused to sign the release that accompanied the severance package, and on October 26, 1993, he received a termination letter from Plano Bank stating that he was terminated as of October 31, 1993.

On May 19, 1995, Russell filed suit against Plano Bank claiming that it had violated the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213 (1994), by failing to reasonably accommodate him and by ultimately terminating his employment. After a three-day trial, the jury returned a verdict finding that Russell was not a qualified individual with a disability. The district court therefore entered a judgment that Russell take nothing on his claims, and Russell timely appealed.

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[1] Plano Bank disputes this assertion, claiming that Russell's physicians never gave him a full release to return to work and that Plano Bank's policy required such a release before it could allow him to return.

II. DISCUSSION

A. The Jury Instructions

Russell argues that the district court's jury instruction contained an erroneous definition of the term "qualified individual with a disability" within the meaning of the ADA which is likely to have misled the jury. He therefore argues that he is entitled to a new trial. At trial, Russell submitted a proposed jury instruction to the district court which read, in part, as follows:

> The term "qualified individual with a disability," as used in these instructions, means an individual with a disability who can perform the essential functions of the employment position at issue, with or without reasonable accommodation.

The definition that th ecourt ultimately gave to the jury read, in part, as follows:

> The phrase "qualified individual with a disability," as used in these instructions, means an individual with a disability who can perform the essential functions of the employment position which the Plaintiff holds or for which the Plaintiff has applied.

The next page of the instructions contained an explanation of the term "essential functions" which included the following statement:

> If a disabled employee is not able to perform the essential functions of his position, with or without reasonable accommodations, as that term is defined in these instructions, the employee can lawfully be terminated and the employer is not required to assign him to alternative employment.

Two pages later, the jury instructions defined "reasonably accommodate" as follows:

> The term "reasonably accommodate" means any effective modification or adjustment to the workplace

> that makes it possible for a person with a disability to perform the essential function of their employment position or to enjoy the same benefits and privileges of employment that are available to any person without a disability.

The Verdict of the Jury included a total of seven interrogatories. Interrogatory Number 1 read as follows: "Do you find from a preponderance of the evidence that Danny L. Russell was a qualified individual with a disability?" Because the jury responded negatively to this question, they did not reach any of the other interrogatories.

Russell argues that he was prejudiced by the form of the jury instructions because the words "with or without reasonable accommodation" were omitted from the definition of qualified individual with a disability. He contends that in answering Interrogatory Number 1, the jury would tend to focus on the specific definition of qualified individual with a disability and was therefore likely to ignore the discussion of reasonable accommodation which appeared in a later part of the jury instructions. In support of his argument, Russell points to the ADA's own definition of qualified individual with a disability, which reads follows:

> The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.

42 U.S.C. § 12111(8) (1994). Russell contends that the reasonable accommodation requirement is the "heart and soul" of the ADA and he therefore argues that the district court's failure to mention reasonable accommodation in its definition of qualified individual with a disability created ineradicable doubt as to whether the jury was properly guided in its deliberations.

In response, Plano Bank first argues that because Russell failed to preserve his objection to the jury instructions, this court's consideration of his appeal is limited to plain error review. Second, Plano Bank notes that although Russell cited to § 104A.04 of the treatise *Federal Jury Practice and Instructions* as support for his proffered instruction, the language in that book is exactly the same as the language used by the district court in its definition of qualified individual with a disability. Finally, Plano Bank contends that there was no reasonable accommodation that would have permitted Russell to fulfill the essential functions of his job because (1) the accommodations that Russell requested were not reasonable, and (2) even if the requested accommodations were implemented, Russell was still not qualified for the position he sought due to his mental limitations.

B. Standard of Review

Where a party argues on appeal that the district court erred in refusing to give a proffered jury instruction, that party must "show as a threshold matter that the proposed instruction correctly stated the law." *Federal Deposit Ins. Corp. v. Mijalis*, 15 F.3d 1314, 1318 (5th Cir. 1994). As Russell's proffered instruction tracked the language of the ADA, there is no question that it was a correct statement of the law.

Once that threshold is met, we generally apply a two-part test in considering a challenge to the district court's jury instructions. The party challenging the instructions must first "demonstrate that the charge as a whole creates 'substantial and ineradicable doubt whether the jury has been properly guided in its deliberations.'" *Id.* (quoting *Bender v. Brumley*, 1 F.3d 271, 276 (5th Cir.1993)). Second, even where a jury instruction was erroneous, "we will not reverse if we determine, based upon the entire record, that the challenged instruction could not have affected the outcome of the case." *Id.*

Moreover, in determining whether the instruction was erroneous, we accord substantial deference to the decision of the district court. *Id.* at 1319.

A prerequisite to our review of the instructions in this manner, however, is that the objection must have been brought to the attention of the district court at trial. 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2553 (2d ed. 1995) ("In the absence of a properly specific objection under Rule 51 made before the jury retires, a party ordinarily cannot claim on appeal that the trial court erred in the giving of an erroneous instruction or the failure to give a requested instruction." (footnotes omitted)).

In order to raise the issue before the district court in the proper manner, the complaining party must comply with Federal Rule of Civil Procedure 51, which states that "[n]o party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." FED.R.CIV.P. 51. In the instant case, Russell submitted a proposed jury instruction that the district court rejected. A party may not satisfy the requirements of Rule 51 by merely submitting to the court a proposed instruction that differs from the instruction ultimately given to the jury. *See Kelly v. Boeing Petroleum Servs., Inc.*, 61 F.3d 350, 361 (5th Cir.1996). Moreover, "parties are not entitled to have the jury instructed in the precise language or form they suggest." *Wilson v. Zapata Off-Shore Co.*, 939 F.2d 260, 270 (5th Cir.1991).

In addition to submitting his own instructions, however, Russell's attorney objected to the district court's instructions, stating "can we just have an objection that to the extent that the Plaintiff's requested instructions were not given, we would object on that ground." The court responded, "[t]he objections will be overruled. And the Court will state for the record to the extent the re-

quested instructions of the Plaintiff are not substantially covered—given in the Court's charge, they are refused." In addition, Russell's attorney specifically objected to a portion of the instructions dealing with good faith and undue hardship, but he made no specific reference to the omission of the words "with or without reasonable accommodation" from the definition of qualified individual with a disability.

We have repeatedly held that a general objection to the district court's jury instructions is insufficient to satisfy Rule 51. *See, e.g., Bolton v. Tesoro Petroleum Corp.*, 871 F.2d 1266, 1272 (5th Cir.1989) (finding appellants' objection "to the extent any charge [they] requested was not given by the Court" to be insufficient to "inform the trial court of a perceived problem"); *Tandy Brands, Inc. v. Harper*, 760 F.2d 648, 654 (5th Cir.1985) (finding that appellant's purported objection did "not satisfy Rule 51's requirement that a party state 'distinctly the matter to which he objects and the grounds of his objection' " and was not " 'sufficiently specific to bring into focus the precise nature of the alleged error' " (quoting *Delancey v. Motichek Towing Serv., Inc.*, 427 F.2d 897, 900 (5th Cir.1970))); *Williams v. Hoyt*, 556 F.2d 1336, 1340 (5th Cir.1977) ("The sweeping generalization that the court's charge to the jury was 'fundamentally wrong' and 'not a fair statement of the law' does not require extended discussion. Appellants failed to object to the court's instructions."). Russell's objection was not specific enough to apprise the district court of his particular problem with the challenged instruction, and it therefore failed to satisfy the requirements of Rule 51.

A party may be excused from the requirement of making a specific objection only where "the party's position previously has been made clear to the trial judge and it is plain that a further objection would be unavailing." 9A WRIGHT ET AL., *supra*, § 2553. "Only when the appellate court is sure that the trial court was ade-

quately informed as to a litigant's contentions may the appellate court reverse on the basis of jury instructions to which there was not formal objection." *Industrial Dev. Bd. of the Town of Section, Alabama v. Fuqua Indus., Inc.*, 523 F.2d 1226, 1238 (5th Cir.1975). For example, in *Pierce v. Ramsey Winch Co.*, 753 F.2d 416 (5th Cir. 1985), this court found that the defendant adequately preserved its objections to the jury instruction by making a general objection to the court's failure to include its requested instructions and by including in the record (1) its proposed instructions that the court had rejected and (2) a memorandum setting forth its position regarding its proposed instructions. *Id.* at 424. In that case, the fact that the objecting party's specific disagreements with the jury instructions were included in the record assured us that the trial court was fully aware of the substance of the objections, and we therefore concluded that the purpose of Rule 51 had been served. *See id.* In contrast, in the instant case, there is no evidence in the record that Russell's position regarding the omission of the words "with or without reasonable accommodation" from the paragraph defining qualified individual with a disability was made clear to the trial judge.[2]

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[2] At oral argument and in his Reply Brief, Rusell's attorney claimed that he explained his specific objection to the instruction at issue to the district court in an off-the-record conference. Russell relies on the Seventh Circuit's decision in *Niehus v. Liberio*, 973 P.2d 526 (7th Cir.1992), to support his argument that the objection need not be stated in the record so long as the trial court has been made aware of it. The *Niehus* court noted that

> nothing in the text of Rule 51 requires that the objection be stated on the record; and the main purpose of the rule—to give the judge a chance to correct an error that might require a reversal and new trial—does not require that the objection be recorded.

Id. at 529 (citations omitted).

Russell's reliance on *Niehus* is misplaced. In *Niehus*, the court based its decision, at least in part, on the fact that "[t]he uncon-

Where the party challenging the district court's instructions has failed to raise the objection before the district court and this position has not been made clear to the court in some other manner, our consideration of the issue is limited to plain error review. *Highlands Ins. Co. v. National Union Fire Ins. Co.*, 27 F.3d 1027, 1031-32 (5th Cir.1994). In order for an appellant to prevail under this level of scrutiny he must show: "(1) that an

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tradicted affidavit by the defendants' lawyer . . . establishe[d] that there was no violation of Rule 51." *Id.* at 530. We do not think that a party's failure to make a formal, on-the-record objection or to state clearly the grounds for their objection, as required by Rule 51, may be remedied by the submission of an affidavit stating that the objection was made. Moreover, the holding in *Niehus* conflicts with the settled law of this circuit; we have held that

> [t]he precedure of holding off-the-record charge conferences and failing to reflect what transpired is, we think, in clear violation of the spirit of Fed.R.Civ.P. 51. . . . Obviously, we cannot consider off-the-record objections to jury instructions not subsequently made part of the record. . . .

King v. Ford Motor Co., 597 F.2d 436, 440 n. 3 ((5th Cir.1979). Indeed, this circuit has never approved of off-the-record objections as a method of satisfying the requirements of Rule 51. *Cf. Bolton*, 871 F.2d at 1272 (finding that raising an objection at an informal conference with the trial judge's law clerk was insufficient to preserve the objection where the conference was not on the record); *Burns v. Travelers Ins. Co.*, 344 F.2d 70, 73 (5th Cir. 1965) ("If the proper objection does not appear in the record, then the appellate court need not consider the alleged error."). Finally, we note that we are not alone in our strict application of Rule 51; other circuits enforce the requirement that the specific grounds of the objection be clear from the record. *See, e.g., Dupre v. Fru-Con Eng'g, Inc.*, 112 F.3d 329, 334 (8th Cir.1997) (rejecting *Niehus*'s reasoning and holding that "to preserve an argument concerning a jury instruction for appelalte review, a party must state distinctly the matter objected to and the grounds for the objection on the record"); *Coy v. Simpson Marine Safety Equip., Inc.*, 787 F.2d 19, 25 (1st Cir.1985) (reviewing jury instructions only for plain error where the specific grounds of the objections "were not stated for the record after delivery of the charge to the jury and no transcript of a conference held in chambers prior to the charge is available").

error occurred; (2) that the error was plain, which means clear or obvious; (3) the plain error must affect substantial rights; and (4) not correcting the error would 'seriously affect the fairness, integrity, or public reputation of judicial proceedings.' " *Id.* at 1032 (quoting *United States v. Olano*, 507 U.S. 725, 736, 113 S.Ct. 1770, 1778-79, 123 L.Ed.2d 508 (1993), and holding that " '[t]he principles and decision enunciated in *Olano* apply a *fortiori* in the civil context.' " (quoting *Smith v. Gulf Oil Co.*, 995 F.2d 638, 646 (6th Cir.1993))).

C. Application of the Plain Error Standard to Russell's Claim

As Russell failed to satisfy the requirements of Rule 51, we review the district court's jury instructions only for plain error. At the outset, Russell must prove that an error occurred. In determining whether a particular jury instruction was erroneous, we consider the jury charge as a whole. *Turnage v. General Elec. Co.*, 953 F.2d 206, 211-12 (5th Cir.1992) ("An inadequate instruction merits reversal when 'the charge as a whole leaves us with the substantial and ineradicable doubt whether the jury has been properly guided in its deliberations' " (quoting *Bommarito v. Penrod Drilling Corp.*, 929 F.2d 186, 189 (5th Cir.1991))); 9A CHARLES A. WRIGHT & ARTHUR R. MILLER, *supra*, § 2558 ("In determining whether the charge is erroneous, the charge must be considered as a whole by the appellate court."). Viewed in their entirety, the jury instructions in this case were not erroneous. Although the words "with or without reasonable accommodation" were omitted from the paragraph about which Russell complains, the jury instructions mentioned reasonable accommodation numerous times. Specifically, the explanation of essential functions included a reference to reasonable accommodation, and the term "reasonably accommodate" was explicitly defined shortly thereafter.

Russell claims, however, that the fact that Interrogatory Number 1 directed the jury to consider only whether Russell was a qualified individual with a disability means that it is likely that the jury failed to consider Plano Bank's duty to reasonably accommodate him because that was not mentioned in the definition of qualified individual with a disability. We disagree. "Juries are presumed to follow the instructions of the court." *United States v. Fletcher,* 121 F.3d 187, 197 (5th Cir.1997) (citing *Zafiro v. United States,* 506 U.S. 523, 540-41, 113 S.Ct. 933, 938-39, 122 L.Ed.2d 317 (1993)). The district court's instructions specifically admonished the jurors that they were "not to single out one instruction alone as stating the law, but must consider the instructions as a whole." Absent any indication that the jury was confused by or failed to follow the district court's instructions, we cannot say that the omission of the words "with or without reasonable accommodation" from the paragraph at issue constituted error.

Even assuming, however, that it was error for the district court to omit the language at issue from the definition, the requirement of plain error are exacting and the plain error exception is a narrow one that applies only where " 'the error is so fundamental as to result in a miscarriage of justice.' " *Johnson v. Helmerich & Payne, Inc.,* 892 F.2d 422, 424 (5th Cir.1990) (quoting *Sandidge v. Salen Offshore Drilling Co.,* 764 F.2d 252, 262 (5th Cir.1985)); *see also* 9A WRIGHT ET AL., *supra,* § 2558 ("If there is to be a plain error exception to Rule 51 at all, it should be confined to the exceptional case when the error seriously has affected the fairness, integrity, or public reputation of the trial court's proceedings."). Moreover, in considering the requirements of plain error after the Supreme Court's decision in *Olano,* we have stated that

> *Olano*'s requirement of an "obvious" error is stringent. The Court said that "at a minimum" an

> alleged error must be "clear under current law." *United States v. Frady* [456 U.S. 152, 102 S.Ct. 1584, 71 L.Ed.2d 816], an opinion cited by *Olano*, required error so clear that "the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." It is the unusual case that will present such an error.

Highlands Ins. Co., 27 F.3d at 1032 (footnotes omitted).

Russell has presented no evidence that the alleged error was "clear under current law." *Id.* In fact, in his own proposed jury instructions Russell cited to the very treatise that contains the pattern jury instruction about which he now complains. *See* 3 HON. EDWARD J. DEVITT ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 104A.04 (4th ed. Supp.1997). Further, this court has found no cases, in this circuit or any other, that criticize the pattern jury instruction used by the district court to define qualified individual with a disability. As a result, we cannot conclude that the district court's error, if any, was clear under current law. Thus, while in retrospect a definition of qualified individual with a disability that included the words "with or without reasonable accommodation" may have been preferable, we cannot say that it was plain error for the district court to fail to include such language in a particular paragraph of a twenty-seven page jury instruction which fully explained reasonable accommodation in later paragraphs and admonished the jury to consider the instructions as a whole is deciding on a verdict.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court.

APPENDIX B

[Filed Jun. 12, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

4:95cv118

DANNY L. RUSSELL,
Plaintiff,

v.

PLANO BANK & TRUST,
Defendant.

COURT'S INSTRUCTION TO THE JURY

Members of the Jury:

Now that you have heard all of the evidence and the argument of counsel, it becomes my duty to give you the instructions of the Court concerning the law applicable to this case.

It is your duty as jurors to follow the law as I shall state it to you, and to apply that law to the facts as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by me. Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty to base a verdict upon any view of the law other than that given in the instructions of the Court, just as it would also be a violation of your sworn

duty, as judges of the facts, to base a verdict upon anything other than the evidence in the case.

In deciding the facts of this case you must not be swayed by bias or prejudice or favor as to any party. Our system of law does not permit jurors to be governed by prejudice or sympathy or public opinion. Both the parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the Court, and reach a just verdict regardless of the consequences.

This case should be considered and decided by you as an action between persons of equal standing in the community, and holding the same or similar stations in life. The law is no respecter of persons, and a bank and all other persons stand equal before the law and are to be dealt with as equals in a court of justice.

As stated earlier, it is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. The term "evidence" includes the sworn testimony of the witnesses and the exhibits admitted in the record.

Remember that any statements, objections or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that they believe are most significant or most helpful to their side of the case and in so doing, to call your attention to certain facts or inferences that might otherwise escape your notice.

In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

So, while you should consider only the evidence that I have admitted in the case, you are permitted to draw such reasonable inferences from the testimony and ex-

hibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the evidence in the case.

There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence—such as the testimony of an eyewitness. The other is indirect or circumstantial evidence—the proof of a chain of circumstances pointing to the existence or non-existence of certain facts. The law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

Now, I have said that you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or "believabiilty" of each witness and the weight to be given the witness's testimony. An important part of your job will be making judgments about the testimony of the witnesses who testified in this case. You should decide whether you believe what each person had to say, and how important that testimony was. In making that decision I suggest that you ask yourself a few questions: Did the person impress you as honest? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness have any relationship with either the plaintiff or the defendant? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to understand the questions clearly and answer them directly? Did the witness's testimony differ from the testimony of other witnesses? These are a few of the considerations that will help you determine the accuracy of what each witness said.

You should kee in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people naturally tend to forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether that misstatement was simply an innocent lapse of memory or an intentional falsehood; and that may depend on whether it has to do with an important fact or with only an unimportant detail.

In making up your mind and reaching a verdict, do not make any decision simply because there were more witnesses on one side than on the other. Do not reach a conclusion on a particular point just because theer were more witnesses testifying for one side on that point. Your job is to carefully consider the testimony of each witness you have heard and decide how much you believe of what each witness had to say.

The testimony of a single witness may be sufficient to prove any fact, even if a greater number of witnesses may have testified to the contrary, if after considering all the other evidence you believe that single witness.

The testimony of a witness may be discredited or impeached by showing that the witness testified falsely concerning a material matter, or by evidence that at some other time the witness said or did something, or failed to say or do something, which is inconsistent with the testimony the witness gave at this trial.

If you believe that any witness has been so impeached, then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you may think it deserves.

During the trial of this case, certain testimony has been shown to you by way of a video deposition, consisting of sworn recorded answers to questions asked of the witness in advance of the trial by one or more of the attorneys

for the parties to this case. Such testimony is entitled to the same consideration, and is to be judged as to credibility, and weighed, and otherwise considered by the jury, in so far as possible, in the same way as if the witness had testified from the witness stand.

During the trial you heard the testimony of Dr. Richard Fulbright, who was presented to you as an expert in the field of neuropsychology.

When knowledge of technical subject matter may be helpful to the jury, a person who has special training or experience in that technical field—they are called an expert witness—is permitted to state their opinion on those technical matters. However, you are not required to accept that opinion. As with any other witness, it is up to you to decide whether to rely upon it.

In deciding whether to accept or rely upon the opinion of an expert witness, you may consider any bias of the witness, including any bias you may infer from evidence that the expert witness has been or will be paid for reviewing the case and testifying, or from evidence that he or she testifies regularly as an expert witness and that the expert' income from such testimony represents a significant portion of his income.

The burden is on the Plaintiff in a civil action such as this to prove every essential element of his claim by a "preponderance of the evidence." A preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not true. In other words, to establish a claim by a "preponderance of the evidence" merely means to prove that the claim is more likely so than not so.

In determining whether any fact in issue has been proved by a preponderance of the evidence, the jury may

consider the testimony of all of the witnesses, regardless of who may have called them, and all of the exhibits received in evidence regardless of who may have produced them. If the proof should fail to establish any essential element of Plaintiff's claim by a preponderance of the evidence, the jury should find for the Defendant as to that particular claim. I am now going to give you some additional instructions, as well as the contentions of the parties.

As a result of an automobile accident in August 1992, Plaintiff Danny L. Russell suffered a concussion post-late effect or brain injury. As a result of this injury, Plaintiff began having health problems, including seizures in September 1992. Because of his injuries, Russell ought medical attention and was placed on disability leave from his position as Vice-President at Defendant Plano Bank and Trust while he underwent evaluation and treatment.

Plaintiff contends that in December 1992, his doctors released him to work for one and a half hours per day. Although Defendant's representative, Mr. Jeff Chase, originally agreed to this, after further thought, Plaintiff alleges the Defendant took the position that Russell could come back to work only when he could work a minimum of four hours per day. Accordingly Plaintiff continued his treatment until July 1993.

On July 10, 1993, Plaintiff contends he again met with Mr. Chase and informed him that he had been released to return to work for four hours a day per the Defendant's requirement. Plaintiff contends that Mr. Chase informed him that the Bank was not sure a position remained for him at Plano Bank and Trust. Ultimately Plaintiff was terminated by Defendant in October 1993.

Plaintiff contends that he was terminated in violation of the Americans with Disabilities Act otherwise known as the ADA. Plaintiff further asserts that he was a qualified individual with a disability under the ADA and that

Defendant failed to provide him reasonable accommodation as required by the ADA.

Defendant contends Plaintiff is not a qualified individual with a disability as that term is defined by the ADA. Specifically, Defendant argues that at the time of his termination, Plaintiff could no longer perform the essential functions of his position at the Bank with or without reasonable accommodations. Furthermore, Defendant maintains that providing reasonable accommodation to Plaintiff would have imposed an undue hardship on the Defendant.

Defendant further contends that Plaintiff's former position as head of the problem loan and asset section had been eliminated and that no comparable positions were available for Plaintiff from July 10, 1993, which is the date he claims he was able to return to work for four hours per day, until the time of his termination.

The parties have agreed, or stipulated that:

(1) Defendant is subject to the provisions of the Americans with Disabilities Act.

(2) Plaintiff is 42 years old and resides in Plano, Collin County, Texas. Plaintiff was employed by the Defendant from August 15, 1980, until October 31, 1993. At the time of his termination, Plaintiff was employed in the position of Vice-President.

(3) Russell began his employment at the Bank in August 1980, as a Vice-President. Russell was a valuable employee of the Bank, and received several promotions throughout his tenure at the Bank. Russell received his last promotion in 1989, at which time Russell was promoted to Vice-President and Special Asset Department Manager.

(4) As Special Asset Department Manager from 1989, through the date of Russell's accident in August of 1992,

Russell' duties and responsibilities at the Bank included the following:

a. to establish clear plans of action as to the work-out, collection, recovery and/or exit of each asset identified as a problem;

b. ascertain the history of credit relationships to determine what, if any, potential vulnerabilities may develop that could expose the Bank to future, unknown losses;

c. evaluate collateral securing the problem credits and establish a reasonable value both at market and in liquidation to establish the level of loss, if any, to which the Bank may be exposed;

d. perform complete financial analysis including spread, cash flow, and *pro forma* to determine the physical condition of companies or individuals known as problem credits;

e. prepare and deliver to the President and Senior Lending Officer and Board of Directors of the Bank periodic progress and status reports on the condition of problem assets;

f. serve as a member of the Officer's Loan Committee and an *ex-officio* member of the Director's Loan and Discount Workout Committee;

g. keep abreast of all legal issues surrounding collection activities and work with counsel for the Bank in minimizing the Bank's exposure on problem credits;

h. coordinate the efforts of the Bank with external collection agencies;

i. handle follow-up and recovery efforts on prior judgments, charge-offs, and the like;

j. assist management of the Bank in developing problem loan forecasts;

k. assist the Bank's management of "other real estate owned" in disposing of all "other real estate owned" assets of the Bank;

l. assist the Bank's Senior Lender with training programs that may be of benefit to other lenders in the Bank; and

m. serve as an expert in handling bankruptcy cases housed in the bank.

(5) Russell's position as Special Asset Department Manager from 1989, through the date of his accident in 1992, included the supervision of three (3) Bank employees who reported directly to Russell. Russell was in charge of coordinating the work efforts of these employees, and providing these employees with their annual performance reviews.

(6) Russell's primary objective as Special Asset Manager from 1989, through the date of his accident in 1992, was to reduce the Bank's problem loan portfolio.

(7) For the period between 1989 and 1992, Russell and the Special Asset Department of the Bank were successful in reducing the Bank's problem loan portfolio.

(8) The Bank eliminated the Special Asset Department on or about August 1, 1993.

(9) On or about August 4, 1992, Russell was involved in a motor vehicle accident.

(10) Russell suffered neck, shoulder and back injuries, and a "concussion post-late effect, also known as a brain injury."

(11) Beginning in September of 1992, Russell began experiencing "partial complex seizures" as a result of the accident. The last partial complex seizure which Russell

experienced before he began taking anti-seizure drugs was early 1993. In fact, Russell experienced a seizure in his office at the Bank in September of 1992, a few weeks after the accident.

(12) The symptoms of a partial complex seizure included, without limitation, disorientation, muscle twitching in extremities, blank staring, sensitivity to sound and light, irritability, and rage.

(13) Throughout his treatment for the injuries sustained in the accident, Russell was attended by several medical professionals. The primary medical professionals involved in Russells treatment were John Claude Krusz, Ph.D, M.D. (a neurologist) and Richard L. Fulbright, Ph.D (a neuropsychologist).

(14) Defendant has maintained and does maintain various employment benefit plans, including a comprehensive health insurance plan for full time employees, disability insurance, life insurance, sick leave, and a retirement plan.

(15) On December 15, 1992, Russell, his wife, and his treating neuropsychologist, Dr. Richard Fulbright, met with Jeff Chase, Russell's supervisor and Defendant's Executive Vice-President.

As I previously stated, the facts I just read to you were agreed to by both parties. This means that both sides agree that these are facts in this case. I am instructing you therefore, that you must treat these facts as having been proved.

I will now instruct you on the substantive law specifically applicable to Plaintiff's claims.

It is unlawful for an employer to intentionally discriminate against a qualified individual with a disability because of that person's disabiilty. In this case, Plaintiff claims that the Defendant intentionally discriminated against him because he had a disability. Specifically, Plaintiff contends Defendant is liable under the ADA for

its termination of him and for Defendant's alleged failure to provide reasonable accommodations for Plaintiff's disability.

The Americans with Disabilities Act is an antidiscrimination statute that requires individuals with disabilities be given the same consideration for employment that individuals without disabilities are given. An individual who is qualified for an employment opportunity cannot be denied that opportunity solely because of the fact that he has a disability. I caution you however, that the ADA is not intended to give any advantage to an individual with a disability. The ADA is only intended to provide equality of opportunity for such individuals, not preferential treatment.

Under the ADA, an employee's disability may not enter into his employer's decision to terminate that employee, so long as the employee is otherwise qualified for the position he or she holds. Moreover, an employer has a duty to make a good faith effort to provide reasonable accommodation to known disabilities of its employees who are otherwise qualified for employment, if the reasonable accommodation of that employee's disability will not cause undue hardship to the employer.

In order for Plaintiff Danny L. Russell to establish his claim of intentional discrimination by Defendant Plano Bank & Trust in its decision to terminate him, he has the burden of proving the following essential elements by a preponderance of the evidence that:

> *One:* Danny L. Russell is a qualified individual with a disability as that phrase is defined in these instructions;
>
> *Two:* Defendant Plano Bank & Trust intentionally discriminated against Plaintiff, that is, the fact that Plaintiff Danny L. Russell was a qualified individual with a disability was a motivating factor in the Defendant's decision to terminate the Plaintiff; and

Three: As a direct result of the Defendant's intentional discrimination, the Plaintiff sustained damages.

The term "disability", as used in these instructions, means a physical or mental impairment that substantially limits one of the major actiivties of life, such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, or working.

The phase "qualified individual with a disability" as used in these instructions, means an indivdiual with a disability who can perform the essential functions of the employment position which the Plaintiff holds or for which the Plaintiff has applied. You should give consideration to, but are obviously not bound by, the employer's judgment as to what functions of a job are essential.

The phrase "essential functions of the employment position" as used in these instructions, means the basic, fundamental duties of the position the Plaintiff holds or for which the Plaintiff has applied. Essential functions do not include marginal functions of the position. Essential functions do include the ability to work on a regular and consistent basis.

A job function may be considered essential for any of several reasons, including but not limited to the following:

(1) because the reason the position exists is to perform that function;

(2) because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

(3) because the function may be highly specialized so that a person is hired for his expertise or ability to perform that particular function.

In determining whether a particular function is essential, you may consider, along with all the other evidence in the case, the employer's judgment as to what is essen-

tial, any written job descriptions prepared by the employer prior to interviewing or bidding for that position, amount of time spent on the job performing that function, consequences of not requiring performance of that function, as well as past or current work experience and skills of employees in that position.

If a disabled employee is not able to perform the essential functions of his position, with or without reasonable accommodations, as that term is defined in these instructions, the employee can lawfully be terminated and the employer is not required to assign him to alternative employment.

To establish disability discrimination in connection with his discharge, Plaintiff has the burden of proving by a preponderance of the evidence that his disability contributed to Defendant's decision to discharge him. Plaintiff need not show that his disability was the only factor on which Defendant acted, but he must prove that his disability was a determining factor in Defendant's motivation.

Plaintiff may satisfy his burden in either of two ways: (1) directly, by persuading you that a discriminatory reason more than likely motivated Defendant, or (2) indirectly, by showing that Defendant's reason for its actions is not credible or believable. Under the indirect method of proof, if Plaintiff succeeds in proving to you that Defendant's stated reason for terminating Plaintiff's employment is not credible or believable you may, but are not required to, infer that Defendant was motivated by discriminatory reasons and intended to discriminate against Plaintiff because of his disability.

Plaintiff is not required to produce direct evidence of Defendant's motive in order to succeed on his case. Discrimination, if it exists, is seldom admitted, but may be inferred from the existence of other facts.

As you will recall, Plaintiff has also brought a claim against the Defendant for allegedly failing to provide rea-

sonable accommodations for his disabilities from July 10, 1993, which is the date he claims he was able to return to work for four hours per day, until the time of his termination on October 31, 1993, in violation of the ADA. In order to recover on his claim of intentional discrimination by a failure to reasonably accommodate, Plaintiff must prove by a preponderance of the evidence that:

> *One:* Plaintiff had a disability as that term has been defined for you in these instructions.
>
> *Two:* Plaintiff was a qualified individual with a disability, as that term has been previously defined for you in these instructions; and
>
> *Three:* Defendant failed to reasonably accommodate Plaintiff's disability.

The term "reasonably accommodate" means any effective modification or adjustment to the workplace that makes it possible for a person with a disability to perform the essential functions of their employment position or to enjoy the same benefits and privileges of employment that are available to any person without a disability. The phrase "essential functions of the employment position" has been defined for you previously in these instructions.

The obligations to provide a reasonable accommodation applies to all aspects of employment, and an employer cannot deny an employment opportunity to a qualified applicant or employee because of the need to provide reasonable accommodation. Reasonable accommodation may include job restructuring, part-time or modified work schedules, reassignment to a vacant position, and acquisition or modification of equipment or devices. In am instructing you that in determining whether Defendant failed to reasonably accommodate Plaintiff by reassignment to another position, you may consider only those positions that were vacant or that Defendant knew or rea-

sonably could have known would become vacant within a reasonable time.

An accommodation is not a reasonable accommodation if it would cause undue hardship to the employer. I am further instructing you that a reasonable accommodation need not be the best accommodation available, nor must it be the one actually requested by the employee. Although the law requires an employer to make "reasonable accommoations" for qualified individuals with disabilities, the law does not require an employer to make fundamental or substantial modifications of its normal operations to insure every disabled employee the benefits of employment.

The ADA does not require an employer to bear the burden of creating reasonable accommodations without the employee's participation. Rather, the ADA intends for both the employer and employee to engage in a cooperative effort to find and implement reasonable accommodations for the employee's disability. It is the responsibility of the employee with the disability to inform the employer that an accommodation is needed for the emplioyee to be able to perform his essential job functions so as to receive the equal benefits and privileges of employment of nondisabled persons. An employer is not required to provide an accommodation if unaware of the need for any particular accommodation.

The Defendant in this case has asserted as a defense that it has made a good faith effort to reasonably accommodate the alleged disability of the Plaintiff. In order to prove this defense, the Defendant must prove by a preponderance of the evidence that:

> *One:* Plaintiff had informed the Defendant that reasonable accommodations, as defined in these instructions, were needed because of Plaintiff's alleged disability; and

Two: Defendant made a good faith effort, in consultation with the Plaintiff, to identify and make a reasonable accommodation that would provide Plaintiff with an equally effective opportunity at the work place; or

Three: The efforts at the reasonable accommodation would cause an undue hardship on the operation of the Defendant's business.

The term "undue hardship", as used in these instructions, means action requiring Defendant to incur significant expense or undergo significant difficulty when considered in light of the following:

One, the nature and net cost of the accommodation;

Two, the overall financial resources of the Defendant and the number of persons employed by the Defendant; and

Three, the type of the Defendant's business, including the composition, structure, and functions of the Defendant's workforce.

In the event you are convinced by the evidence that the Plaintiff has proven his claim by a preponderance of the evidence, then you must determine the amount of damages to which the Plaintiff is entitled.

Of course, the fact that I am giving you instructions concerning the issue of Plaintiff's damages should not be interpreted in any way as an indication that I believe that the Plaintiff should, or should not, prevail in this case. It is your task first to decide whether the Defendant is liable. I am instructing you on damages only so that you will have guidance in the event you decide that the Defendant is liable and that the Plaintiff is entitled to recover money from the Defendant.

If you find that the Defendant is liable to the Plaintiff, the Plaintiff is entitled to recover an amount which will reasonably compensate him for the loss and damage he has suffered as a result of the Defendant's conduct. Conduct by a defendant that does not cause harm does not entitle a plaintiff to damages. By the same token, harm to a plaintiff which is not the result of conduct by a defendant does not entitle a plaintiff to damages either.

If you find that Defendant intentionally discriminated against Plaintiff because of his disability either by terminating him or by failing to reasonably accommodate his disability, then you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the damages experienced by Plaintiff, no more and no less. Damages must not be based on speculation because it is only actual damages—what the law calls compensatory damages—that are recoverable. Compensatory damages are not allowed as a punishment and cannot be imposed or increased to penalize the Defendant. Compensatory damages, however, are not limited to expenses that the Plaintiff may have incurred for his injuries.

You may award as actual damages an amount that reasonably compensates the Plaintiff for any lost wages and benefits, taking into consideration any increases in salary and benefits, including pension, that the Plaintiff would have received had he not been discriminated against. Basically, you have the ability to make the Plaintiff whole for any wages or other benefits that he has lost as a result of Defendant's employment decisions.

To the extent you find them, you should also calculate separately, as future damages, a monetary amount equal to the present value of wages and benefits that the Plaintiff would have earned had he not been discriminated

against or terminated for that period from the date of your verdict until the date when the Plaintiff would have voluntarily resigned or obtained other employment.

An award of future damages necessarily requires that payment be made now for a loss that the Plaintiff will not actually suffer until some future date. If you should find that the Plaintiff is entitled to future damages, including future earnings and benefits, then you must determine the present worth in dollars of such future damages .

If you award damages for future earnings and benefits, you must consider two particular factors:

1. You should reduce any award by the amount of the expenses that the Plaintiff would have incurred in obtaining those earnings or benefits.

2. If you make an award for future loss of earnings or benefits, you must reduce it to present value by considering the interest that the Plaintiff could earn on the amount of the award if he made a relatively risk-free investment. The reason why you must make this reduction is because an award of an amount representing future loss of earnings and benefits is more valuable to the Plaintiff if he receives it today than if he received it in the future, when he would have otherwise earned it. It is more valuable because the Plaintiff can earn interest on it for the period of time between the date of the award and the date he would have earned the money or benefit. Thus, you should adjust the amount of any award for future loss of earnings or benefits by the amount of interest that the Plaintiff can earn on that amount in the future.

The Plaintiff alleges that as a result of the Defendant's conduct, he has suffered mental anguish. If the Plaintiff prevails on his claim, he is entitled to compensatory damages for any such damages he has suffered because of the

Defendant's conduct. "Mental Anguish" means the emotional pain, torment, and suffering experienced by the Plaintiff because of the Defendant's alleged wrongful conduct.

No evidence of the value of intangible things such as mental anguish need be introduced. You are not trying to determine value, but an amount that will fairly compensate the Plaintiff for the damages he has suffered. There is no exact standard for fixing the compensation to be awarded for this element of damages. Any award that you make should be fair in the light of the evidence.

When considering the amount of monetary damages to which the Plaintiff may be entitled, you should consider the nature, character, and seriousness of any mental anguish, the Plaintiff felt. You must also consider its extent or duration, as any award you make must cover the damages endured by the Plaintiff since the wrongdoing, to the present time, and even into the future if you find that the proofs presented justify the conclusion that the Plaintiff's emotional stress and its consequences have continued to the present time or can reasonably be expected to continue into the ftuture. However, should you find that Plaintiff is entitled to damages for future mental anguish, you must not make any adjustment to present value for such damages.

I am cautioning you, that you must not award compensatory damages more than once for the same injury. For example, if the Plaintiff prevails on two claims and establishes a dollar amount for his injuries, you must not award him any additional compensatory damages on each claim. The Plaintiff is entitled to be made whole once, and may not recover more than he has lost. Of course, if different injuries are attributed to different claims, then you must compensate the plaintiff fully for all of his injuries he has proven by a preponderance of the evidence.

The Plaintiff must make every reasonable effort to minimize or reduce his damages for loss of compensation by seeking employment. This is called mitigation of damages.

If you determine that the Plaintiff is entitled to damages, you must reduce these damages by (1) what the Plaintiff earned and (2) what the Plaintiff could have earned by reasonable effort during the period from his discharge until the date of trial.

You must decide whether the Plaintiff was reasonable in not seeking or accepting a particular job. However, the Plaintiff must accept employment that is "of like nature." In determining whether employment is "of like nature," you may consider

(1) the type of work,

(2) the hours worked,

(3) the compensation,

(4) the job security,

(5) the working conditions, and

(6) other conditions of employment.

The Defendant must prove that the Plaintiff failed to mitigate his damages for loss of compensation.

If you determine that the Plaintiff did not make reasonable efforts to obtain another similar job, you must decide whetther any damages resulted from his failure to do so. You must not compensate the Plaintiff for any portion of his damages that resulted from his failure to make reasonable efforts to reduce his damages.

If you find that the Plaintiff is entitled to damages, you must reduce these damages by (1) any amount the Plaintiff earned; (2) what the Plaintiff could have earned by reasonable effort during the period from his discharge to the date of trial; and (3) any monies Plaintiff has already received as compensation for his damages.

I remind you that it is the Defendant's burden to prove that the Plaintiff faled to mitigate his damages for loss of compensation, or that Plaintiff has already received monies as compensation for his damages.

In addition to the claims for damages already mentioned, you should consider whether the Plaintiff is entitled to punitive damages. These are awarded in exceptional cases as a punishment of the Defendant and as a warning to others to keep them from following the Defendant's example.

You may award these damages if you determine by a preponderance of the evidence that one or more of the Defendant's acts were done with either:

(1) actual malice, which is nothing more or less than intentional wrongdoing—an evil-minded act, or

(2) a wanton and willful disregard for the rights of another—in other words, a deliberate act with knowledge of a high degree of probability of harm to another and reckless indifference to the consequences of the Act.

The Plaintiff has produced what he considers evidence of the Defendant's evil-minded intent or wanton and willful disregard for the Plaintiff's rights because of his alleged disability. You may find that one, all, or none of these examples indicate the Defendant's evil-minded intent toward the Plaintiff. Again, it is for you to determine the credibility, relevance, and significance of each piece of evidence and whether it supports the Plaintiff's contention that punitive damages should be awarded.

If you determine that the facts justify an award of punitive damages, you should try to determine a fair, just, and reasonable amount for the Plaintiff under all circumstances. Punitive damages are not intended to compensate a Plaintiff for injuries, but rather to punish the Defendant and to prevent similar conduct in the future.

Thus, if you award punitive damages, you may consider the Defendant's net worth and the impact of its paying that award.

I am instructing you that any award of punitive damages you might choose to make must bear a reasonable relationship to the Plaintiff's actual injury. However, no single numerical equation has been made to easily link punitive damages to compensatory damages. In determining a reasonable relationship to Plaintiff's actual injuries, you must consider all relevant factors, including: (1) the impact or severity of the Defendant's conduct; (2) the amount of time the Defendant conducted itself in this manner; (3) the amount of compensatory damages; (4) the potential profits the Defendant may have made from the alleged wrongful conduct; (5) the attitudes and actions of the Defendant's top management after the alleged misconduct was discovered; (6) the effect of the damages award on the Defendant's financial condition, and (7) any punishment the Defendant may receive from other sources.

If you do award punitive damages, you should fix the amount using calm discretion and sound reason. You must not be influenced by sympathy or dislike of any party in the case.

Your verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. In other words, your verdict must be unanimous.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of all the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views, and change your opinion, if convinced it is erroneous.

But do not surrender your honest conviction as to the weight or effect of all of the evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

As I instructed you when this case began, you have been permitted to take notes during the course of the trial. I will remind you that any notes that you have taken during this trial are only aids to your memory. If your memory differs from your notes, you should rely on your memory and not on the notes. The notes are not evidence. If you have not taken notes, you should rely on your independent recollection of the evidence and should not be unduly influenced by the notes of other jurors. Notes are not entitled to any greater weight than the recollection or impression of each juror about the testimony.

Remember at all times you are not partisans. You are judges—judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

You have heard all of the evidence in the case and you have heard the argument of counsel. The Court has given you the charge in this case. You will remember that at the beginning of the trial, the Court admonished you not to discuss the case with each other until it was submitted to you. Now is the time for you to begin your discussion, and you certainly may express an opinion from the evidence that you have heard and use any reasonable means to persuade other members of the jury to your convictions and to your honest opinion. You are to reach a verdict which speaks the truth, and which does justice to all parties without favor, bias or prejudice in any particular, either for or against any party to this lawsuit.

Upon retiring to the jury room you should first select one of your number to act as your foreperson who will preside over your deliberations and speak for you here in

Court. A form of verdict has been prepared for your convenience.

Your verdict will be in the form of Interrogatories for you to answer. You will take these Interrogatoies to the jury room, and when you have reached a unanimous agreement as to your verdict, you will have your foreperson fill in, date and sign the form and then advise the Security Officer that you have reached a verdict.

During your deliberations you may have any of the exhibits which have been admitted into evidence, and the Court will send them to you upon written request. If you desire further instructions, your foreperson may make this known in writing, and the Court will try to comply with your wishes.

If, during your deliberations, you should desire to communicate with the Court, please reduce your message or question to writing signed by the foreperson and pass the note to the Security Officer, who will bring it to my attention. I caution you, however, that if and when you communicate with the Court during your deliberations, that you should never state or specify your numerical division at the time.

The Clerk will now hand the Interrogatories to the Security Officer, and you will follow him to the jury room, and begin your deliberations.

As soon as you have reached a verdict you will let this fact be known to the officer who will be waiting upon you and he will report to the Court.

APPENDIX C

[Filed Jun. 12, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

No. 4:95cv118

DANNY L. RUSSELL

v.

PLANO BANK & TRUST

VERDICT OF THE JURY

Your verdict will consist of answers to the following questions.

INTERROGATORY NO. 1

Do you find from a preponderance of the evidence that Danny L. Russell was a qualified individual with a disability?

We do not.

(Answer "We do" or "We do not.")

If you have answered "We do" to Interrogatory No. 1, then proceed to Interrogatory No. 2. If you answered "We do not," proceed no further.

INTERROGATORY NO. 2

Do you find from a preponderance of the evidence that Plano Bank & Trust intentionally discriminated against Danny L. Russell in its decision to terminate his

employment and that plaintiff suffered damages as a result of the Bank's discriminatory conduct?

_____

(Answer "We do" or "We do not.")

Proceed to Interrogatory No. 3.

INTERROGATORY NO. 3

Do you find from a preponderance of the evidence that Plano Bank & Trust was required to provide reasonable accommodations for Danny L. Russell's disability and that it failed to do so?

_____

(Answer "We do" or "We do not.")

If you have answered "We do" to Interrogatory No. 3, then proceed to Interrogatory No. 4. If you answered "We do not," to Interrogatoy No. 3 and "We do" to Interrogatoy No. 2, proceed to Interrogatory No. 5. Otherwise, proceed no further.

INTERROGATORY NO. 4

Do you find from a preponderance of the evidence that Plano Bank & Trust made a good-faith effort to reasonably accommodate Danny L. Russell's disability or that to have done so would have imposed upon Plano Bank & Trust an undue hardship?

_____

(Answer "We do" or "We do not.")

If you answered "We Do" to Interrogatory No. 2, proceed to Interrogatory No. 5. If you answered "We Do" to Interrogatory No. 3 and "We Do Not" as to Interrogatory No. 4, proceed to Interrogatory No. 5. If you answered "We Do Not" to Interrogatoy Nos. 2 and 3, proceed no further. If you answered "We Do Not" to Interrogatory No. 2 and answered "We Do" as to Interrogatory Nos. 3 & 4, proceed no further.

INTERROGATORY NO. 5

What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate Danny L. Russell for his injuries resulting from the defendant's conduct in question?

You are to consider the element of damages listed below and none other. Do not include interest on any amount of damages that you find.

Answer in dolars and cents.

Past earnings and benefits $_____

Future earnings and benefits $_____

Past and future mental anguish $_____

Proceed to Interrogatory No. 6.

INTERROGATORY NO. 6

Do you find from a preponderance of the evidence that Plano Bank & Trust violated Danny L. Russell's rights under the Americans with Disabilities Act with actual malice or with reckless indifference?

_____

(Answer "We do" or "We do not.")

If you answered "We do" to Interrogatoy No. 6, then proceed to Interrogatory No. 7. If you answered "We do not," proceed no further.

INTERROGATORY NO. 7

What sum of money, if any, should be awarded as punitive damages against Plano Bank & Trust as a result of the actions complained of in this case?

Answere in dollars and cents.

$_____

Date: 6-12-96

/s/ Robert M. Powell
Foreperson

APPENDIX D

[Filed Aug. 23, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

No. 4:95cv118

DANNY L. RUSSELL

v.

PLANO BANK & TRUST

AMENDED FINAL JUDGMENT

This action came on for trial before the Court and a jury, the undersigned presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is ORDERED and ADJUDGED that the plaintiff take nothing, that the action be dismissed on the merits and the defendant, Plano Bank & Trust, recover of the plaintiff its costs of action.

This Amended Final Judgment supersedes the Final Judgment entered herein on July 8, 1996.

Signed this 23rd day of August, 1996.

/s/ Paul Brown
United States District Judge

Supreme Court, U.S.
FILED
APR 15 1998
CLERK

No. 97-1551

In The

Supreme Court of the United States

October Term, 1997

DANNY L. RUSSELL,

Petitioner,

vs.

PLANO BANK & TRUST,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Respondent Plano Bank & Trust disagrees with the Questions Presented for review in the Petition.

The sole question is whether the Court should exercise its discretion to grant the Petition when the Petitioner failed to perfect issues for appeal, failed to demonstrate any error in the trial court, and failed to show any conflict in the Circuit Courts on any issue of substantive or procedural law applied by the courts below.

PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceeding.

Respondent Plano Bank & Trust is a wholly owned subsidiary of Plano Bancshares, Inc. Respondent has no nonwholly owned subsidiaries.

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STATEMENT OF THE CASE

Course of Proceedings and Disposition in the Courts Below

Petitioner Danny L. Russell (hereinafter referred to as "Russell") filed his Complaint on May 19, 1995, alleging that Plano Bank & Trust (hereinafter referred to as the "Bank") had discriminated against him in violation of the Americans With Disabilities Act, as amended, 42 U.S.C. § 12101, *et seq.* (hereinafter referred to as the "ADA"). After the close of evidence, and before submission to the Jury, Russell asserted several specific objections to the Court's Charge which are not relevant here. He then added, as his only other "objection": "Can we just have an objection that to the extent that the Plaintiff's requested instructions were not given, we would object on that ground."

Thereafter, the Jury unanimously determined that Russell was not a "qualified individual with a disability" as defined in the Charge. Petitioner's Appendix C, p. 38a. In accordance with the verdict of the Jury, the District Court entered Judgment in favor of the Bank. On August 23, 1996, the District Court entered its Amended Final Judgment in which it ruled that Russell take nothing on all of his claims, including his claims under the ADA. Russell then appealed. The Fifth Circuit Court of Appeals affirmed the Judgment of the District Court on December 19, 1997. *Russell v. Plano Bank & Trust*, 130 F.3d 715 (5th Cir. 1997).

STATEMENT OF FACTS

A. Russell's Job Responsibilities With The Bank Before His Brain Injury

(i) *The Written Job Description*

Russell began his employment at the Bank in August of 1980 as a Vice-President. Russell was a valuable employee of the Bank,

and received several promotions throughout his employment at the Bank. Russell received his last promotion in 1989, at which time he was promoted to Special Asset Department Manager.

As Special Asset Department Manager, Russell's duties and responsibilities at the Bank, as specifically detailed in his written job description admitted into evidence at the trial, included the following: (i) establish clear plans of action as to the workout, collection, recovery, and/or exit of each asset identified as a problem; (ii) research the history of credit relationships with the Bank to determine what, if any, potential vulnerabilities may develop that could expose the Bank to future unknown losses; (iii) evaluate collateral securing the problem credits and establish a reasonable value, both at market and at liquidation, to establish the level of loss, if any, to which the Bank may be exposed; (iv) perform complete financial analysis including spread, cash flow, and *pro forma* to determine the physical condition of companies or individuals known as problem credits to the Bank; (v) prepare and deliver to the President, Senior Lending Officer and Board of Directors of the Bank periodic progress and status reports on the condition of problem assets; (vi) serve as a member of the Officer's Loan Committee and *ex-officio* member of the Director's Loan and Discount Workout Committees; (vii) keep abreast of all legal issues surrounding collection activities and work with counsel for the Bank in minimizing the Bank's exposure and losses on problem credits; (viii) coordinate the efforts of the Bank with external collection agencies; (ix) handle follow-up and recovery efforts on judgments, charge-offs, and the like; (x) assist management of the Bank in developing problem loan forecasts; (xi) assist the Bank's management of "other real estate owned" and disposing of "other real estate owned" assets of the Bank; (xii) assist the Bank's Senior Lending Officer with training programs that may be of benefit to other lending officers in the Bank; and (xiii) serve as an expert in bankruptcy cases handled internally by the Bank.

(ii) *The Job Duties*

Russell held a "project-oriented job," as opposed to a "punch-the-clock" type of job. Russell testified his job required ten to twelve hours of work at the Bank a day, if not more. Russell's job required constant interaction with Bank employees and Bank customers, and required Russell to be at the Bank every day to perform his duties. Frequently, his interactions with Bank customers involved matters of defaulted loans and failures to pay past due debts due the Bank. These encounters were with people hostile to the Bank, about matters involving great financial risk to both the Bank and the borrower. Russell testified that it could cause great damage to the Bank if he forgot a conversation or misunderstood what had been said to him.

In addition, Russell's position included the supervision of three Bank employees who reported directly to Russell. Russell was in charge of coordinating work efforts of these three employees and providing these employees with their annual performance reviews.

Russell's primary objective as Special Asset Department Manager was to reduce the Bank's problem loan portfolio. This process required Russell to use a great deal of business judgment each and every work day. Russell made literally thousands and thousands of judgment calls during the process of discharging these duties.

The level of stress necessary to perform the essential job functions of the Special Asset Department Manager were extremely high. The job required negotiations with "extremely smart people" who were borrowers of the Bank, who had either defaulted in the payments they owed to the Bank, or were trying to intentionally avoid repayment of loans. The job involved a great deal of information, coming from multiple sources, frequently in a rapid fashion.

(iii) *The Pre-Planned Elimination Of The Special Asset Department*

For the period between 1989 and 1992, Russell and the Special Asset Department of the Bank were successful in reducing the Bank's problem loan portfolio by half. By August of 1993, the problem loan portfolio of the Bank was small enough to eliminate the Special Asset Department. The plan to eliminate the Special Asset Department when the problem loan portfolio reached a certain level had been in existence at the Bank for years before Russell's automobile accident. It had been discussed with Russell, and other members of the Special Asset Department, many times before Russell's accident. In accordance with this plan, the Bank eliminated the Special Asset Department on or about August 1, 1993.

B. The Accident And Its Effects On Russell

On or about August 4, 1992, Russell was involved in a motor vehicle accident in which he was rear-ended. He had experienced similar automobile accidents in 1972 and 1982. A few weeks before the 1992 accident, Russell had undergone elective surgery on his neck, which weakened his neck muscles, and made him more susceptible to injury. In the 1992 accident, Russell suffered neck, shoulder, and back injuries, as well as a "concussion post-late effect, also known as a brain injury."

After the 1992 accident, Russell began experiencing "partial complex seizures". Although unknown to the Bank, between the accident and his last day at work at the Bank in September of 1992, Russell suffered ten or more seizures. Russell experienced a seizure in his office at the Bank in September of 1992, which was witnessed by several employees of the Bank. After that day in September of 1992, Russell never came to work at the Bank again. Until that time, the Bank had no knowledge of these seizures. The Bank merely thought Russell was suffering from "whiplash."

Thereafter, in a meeting between one of his physicians and various representatives of the Bank, Russell and his physician expressly stated that in the weeks Russell worked at the Bank after the accident, and before his September seizure at the Bank, Russell had been "masking" doing his job (*i.e.*, faking doing his job).

As the Bank would come to learn, the symptoms of a "partial complex" seizure included, without limitation, disorientation, muscle twitching in the extremities, blank staring, sensitivity to sound and light, irritability, and rage. The rage which Russell experienced would manifest itself by Russell "screaming out" at the top of his lungs and making arm gestures. Russell's wife and his doctor told the Bank in January of 1993 that Russell was not able to function; that he could concentrate for only a minute to a minute-and-a-half; that he could not drive; that he wanted to be kept away from the telephone; that he wanted to be kept away from Bank employees and Bank customers; and that Russell would go into "gridlock" if overstimulated. Further, Russell experienced difficulty in his interpersonal relationships. His wife and sons repeatedly reported to his doctors that he was "difficult," egocentric, and that he would "callously" dismiss them.

Russell's doctors refused to let him drive because he could not stay focused. He would become disoriented, and over-stimulated, resulting in "vapor-lock." In a "vapor lock" condition, Russell could lose control over his vehicle.

C. Russell's Treatment And Rehabilitation

(i) *The Treatment Plan*

In order to alleviate the effects of the 1992 accident, Russell required frequent rests of indeterminate length throughout the day, during which he had to lie down in a quiet, dark place until the feeling of agitation subsided. The rest periods Russell required would range from several minutes to more than a couple of hours, multiple times throughout the day.

In addition to frequent breaks of an undetermined length in a quiet, dark place, Russell also took multiple types of medication. Russell's medications included: (i) Tegretol (to control his seizures); (ii) Buspar (to control his irritability); (iii) Cylert (to assist him in maintaining attention); and (iv) Effexor (to alleviate depression).

These approaches (coping mechanisms and medications) were devised by Russell's physicians. However, even after Russell began this multi-disciplinary approach to his rehabilitation, he continued to experience seizures, "vapor locks," "brown outs", memory loss, impaired attention, great difficulty processing information, difficulty maintaining normal interpersonal relations, difficulty controlling his emotions, memory lapses, and could not stay focused for more than just a few minutes.

(ii) *Russell's Treating Physicians and Their Medical Records*

Throughout his treatment for the injuries sustained in the accident, Russell was attended by several medical professionals. The medical professionals involved in Russell's treatment were John Claude Krusz, Ph.D., MD. (a Neurologist), and Richard L. Fulbright, Ph.D. (a Neuropsychologist). Listed below is a sampling of the statements made in writing by these medical professionals who examined and treated Russell since the date of Russell's accident in August of 1992 (in chronological sequence in order to demonstrate the pace of Russell's neurological "progress"):

a. John Claude Krusz, Ph.D., M.D.

- October 13, 1992 — "It is not advisable that [Russell] return to work at this time".

- January 2, 1993 — "[Russell] still has a very depressed effect and has some questions as to how he is going to function in the real world".

- January 28, 1993 — "I still feel that I have some reservations about [Russell] returning to work successfully".

- November 3, 1993 — "[Russell] certainly is not fit to return to work or to be released." (This statement was made by Russell's doctor several weeks *after* Russell was terminated by the Bank in late October of 1993).

- March 7, 1994 — "[Russell's] condition, although much better than when he first came to see me, is tenuous at best. He still has a lot of irritability and fatiguability. His ability to tolerate any kind of stress is extremely limited. He still gets fatigued on a daily basis, and although he has made attempts to transition back into the workplace, I think this may not be a very realistic goal at this time."

- April 5, 1994 — "Mr. Russell continues to have headaches, memory difficulties, balance problems, sleep difficulties, irritability as abundantly outlined in my prior notes. . . . Mr. Russell has made extremely slow progress and, from my point of view, will be disabled for quite a long time, possibly years."

b. Richard L. Fulbright, Ph.D.

- April 29, 1994 — "In real terms, [Russell's] thinking has been much too slow and inconsistent for him to be able to return to any type of competitive employment approaching his former job description. . . . I continue to be concerned that Mr. Russell's impaired attention, concentration, information processing speed, memory and reasoning abilities

> may result in his making some fatal errors on the job which will ultimately cost him the job."

Dr. Krusz expressly stated on November 3, 1993 that Russell was not fit to return to work or to be released. This was approximately two weeks after Russell had been terminated by the Bank for failing to report to work in the intervening fifteen month period. Dr. Krusz reported that Russell's progress was extremely slow and that he would be disabled for quite a long time, possibly years. Dr. Krusz made these statements in early April of 1994, approximately six months after Russell had been terminated, and nearly two years after the accident.

Dr. Fulbright provided individual psychotherapy over several years to Russell, and Russell's wife. Dr. Fulbright kept progress notes of each therapy session.

The medical records are extremely revealing as to what Russell and his wife were saying to his private physicians, and *vice versa*, at the very same time Russell contended he was able to work in his former job at the Bank. For example, Russell stated in his EEOC Charge of Discrimination that he was able to go back to work at the Bank on July 10, 1993. However, Russell reported at or near that same time to Dr. Krusz that he was suffering from severe depression, tearfulness, moodiness, brown outs, and episodes of not processing information. The session notes with Dr. Fulbright at that time reflect a substantially impaired individual who, by virtue of the brain injuries sustained in the 1992 accident, was not able to function in a job environment, with multiple sensory inputs and stress, or where judgment in interpersonal relations was required.

D. Russell Was Never Released By His Doctors To Return To Work

Russell's treating physicians explicitly stated that Russell could not return to work as late as April 29, 1994, approximately twenty

months after the accident, and six months after Russell's employment was terminated by the Bank in October of 1993. Russell's treating physicians never released Russell for return for work, and repeatedly stated in writing the serious and global nature of the impairments Russell suffered in the accident. The Bank repeatedly asked Russell and Russell's doctors for such a release. It was required by the policy of the Bank before Russell could return to work. Throughout the entire course of Russell's post-accident rehabilitation, however, Russell never obtained such a release to return to work from his doctors. Any implication or suggestion by Russell to the contrary was simply not true.

E. Russell's Requested Accommodations

Russell requested the following accommodations from the Bank: (a) that the Bank provide him with Bank files to be worked on at his home; (b) that the Bank allow him to work on Bank files at his home no more than four hours per day; (c) that the Bank allow him to take as many breaks as needed, of indeterminate length; and (d) that the Bank hire an expert in cognitive rehabilitation at Bank expense to stay with him at his home and assist him in working on Bank files.

These requests for accommodations made by Russell would not have solved the medical problems arising from his brain injury. For example, Russell complained to the Bank about his secretary and a customer of the Bank calling him at home, which upset Russell to the extent that he requested that the Bank see that these calls be stopped.

Further, these accommodations would have required the Bank to re-organize its manner of doing business. It would have required the Bank to permit an unknown quantity of work from Russell on a daily basis, depending on his daily health, mental abilities, and the need for unspecified quiet time ranging from minutes to hours each day. It would also have required the Bank to hire an additional

employee of the Bank to assist Russell in the performance of a highly stressful and complex job, who would have, in all probability, virtually no knowledge about banking, or the activities and/or judgment calls Russell's job required. Finally, Russell's subordinates would be without supervision or guidance.

F. The Bank's Efforts At Accommodation

Nevertheless, the Bank attempted to accommodate Russell in several ways. First, the Bank agreed to allow Russell to have Bank files at home beginning in January of 1993, where he could take breaks as needed. The Bank files were sent to Russell's home, and several weeks later, Russell had done "nothing" with respect to those files. This accommodation was, by Russell's own admission, a complete "failure". The Bank likewise agreed it was a failure.

Second, in January of 1993, the Bank agreed to allow Russell to return to work at the Bank on a 4-hour per day basis. The Bank only required that Russell be engaged in "meaningful work" while at the Bank. The day Russell was to start this re-employment with the Bank, Russell did not show-up, and made no contact with the Bank. Although Russell did not tell the Bank the truth about why he did not report to work in January of 1993 as agreed, the Jury heard the reasons. The reasons were documented in Dr. Fulbright's session notes taken during that time. Russell and Dr. Fulbright concluded, without telling the Bank, that Russell would risk losing his job for performance reasons, and then lose his disability payments, if he attempted to return to work in January of 1993.

The only accommodation Russell requested which the Bank did not agree to try for Russell's benefit was hiring an additional employee at the Bank's expense to be with Russell at his home while he "worked" (*i.e.*, the "cognitive rehabilitation" expert). The Bank did not want to be a mere rehabilitation vehicle for Russell. The Bank saw the issue of hiring another full-time employee to assist Russell at home as an "undue hardship" on the Bank, which

would involve the Bank having to totally revise the way it conducted business.

G. Russell's Medical Records: The "Star" Of The Case

The "story and the whole story" of this case was in Russell's medical records. The medical records were introduced into evidence and were reviewed by the Jury before their verdict. They were extensive and covered a long period of time in Russell's post-accident rehabilitation. The records introduced into evidence began in September/October of 1992, right after the accident, and went through December of 1994, several years later. These medical records covered the critical time period during which the Bank began to discover the real scope of Russell's impairments. Most importantly, the medical records detailed Russell's impairments from the point of view of Russell's treating physicians.

H. Russell's Doctors And The Bank Came To The Same Conclusion

The Bank did not see any of Russell's medical records until this litigation was well underway. Without the benefit of the medical records, however, the Bank came to the same conclusion that Russell's physicians had drawn and reported repeatedly to Russell's disability insurance carrier. The Bank concluded, as had Russell's doctors, that in spite of Russell's best intentions, he was not able to perform the essential functions of his job, or any other positions at the Bank he might have been qualified to hold after the Special Assets Department was eliminated.

REASONS FOR DENYING THE WRIT

The Jury was properly instructed by the District Court in this ADA case. In fact, the District Court's Charge was in complete accordance with the ADA and other authorities. *Devitt, Blackmar, Wolff, and O'Malley*, Federal Jury Practice & Instructions,

§ 104A.04 (Supp. 1996). Russell complained about the fact that the words "reasonable accommodation" did not appear in the District Court's Charge. In truth and in fact, the words "reasonable accommodation" appeared in the Charge more than twenty times. The term was defined and it was also explained to the Jury as a duty imposed on employers. Petitioner's Appendix B, at p. 24a.

Furthermore, Russell did not preserve this argument for appeal in the manner required by Rule 51 of the *Federal Rules of Civil Procedure.*

Lastly, there is no split in the Circuit Courts on any issue of substantive or procedural law applied by the Courts below.

ARGUMENT AND AUTHORITIES

A. Standards

(i) *Rule 51 Of The Federal Rules Of Civil Procedure*

The standard of review regarding Instructions to a Jury is well-settled, as are the requirements of objecting thereto sufficient to preserve error for appeal. Rule 51 of the *Federal Rules of Civil Procedure* states, in relevant part:

> No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection.

The failure to properly object in accordance with Rule 51 waives any error. In *Tandy Brands, Inc. v. Harper*, 760 F.2d 648 (5th Cir. 1985) the following objection was held to be inadequate under Rule 51: "We object to the failure of the Court to instruct the jury as to the theory and importance of the breach of contract on Tandy Brand's part". In this regard, the Fifth Circuit stated:

> This objection clearly does not satisfy Rule 51's requirement that a party state "distinctly the matter to which he objects and the grounds of his objection;" similarly, it was not "sufficiently specific to bring into focus the precise nature of the alleged error." See *Delancy v. Motichek Towing Service, Inc.*, 427 F.2d 897, 900 (5th Cir. 1970).
>
> Additionally, Harper did not object to the trial court's failure to submit any special interrogatories. . . . Any error resulting from the omission was, consequently, waived. . . . In the absence of such an objection, the issue cannot be raised for the first time on appeal.

Tandy Brands, Inc. at 654.

The objections must be specific enough to bring into focus the precise nature of the alleged error. *Palmer v. Hoffman*, 318 U.S. 109 (1943).

Blanket objections just do not meet the requirements of Rule 51 on specificity. *9 Wright & Miller*, Federal Practice and Procedure: Civil, Section 2554, at p. 646 (2d ed. 1995).

Further, error would not be preserved if the party claiming error offered "virtually identical instructions" to these submitted by the Court. *Dillion v. Nissan Motor Co.*, 986 F.2d 263, 269 (8th Cir. 1993); *Federal Crop Ins. Co. v. Hester*, 765 F.2d 723, 727 (8th Cir. 1985).

(ii) *The Duty Of The District Court Regarding Instructions To The Jury*

The trial court is afforded wide latitude in fashioning jury instructions. Technical imperfections are to be ignored. *FDIC v. Wheat*, 970 F.2d 124 (5th Cir. 1992); *Treadaway v. Societe*

Anonyme, 984 F.2d 161 (5th Cir. 1990); *Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 425 (5th Cir. 1985).

Basically, the duty of the trial court is to correctly instruct the jurors on the applicable law of the case and to guide, direct, and assist the jury toward an intelligent understanding of the legal and factual issues involved. 9 *Wright & Miller, supra*, Section 2556 (2d ed. 1995); *see also Bender v. Brumley*, 1 F.3d 271, 276 (5th Cir. 1993).

Reversal is only appropriate when the Court's Charge, as a whole, leaves the appellate court "with substantial and ineradicable doubt whether the Jury has been properly guided in its deliberations." *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1100 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974); *Kyzar v. Vale Do Ri Doce Navegacai, S.A.*, 464 F.2d 285, 290 (5th Cir. 1972), *cert. denied*, 410 U.S. 929 (1973); *see also McCullough v. Beech Aircraft Corp.*, 587 F.2d 754, 759 (5th Cir. 1979).

Even if error in the Instructions has occurred, the Fifth Circuit has stated it still would not reverse, if it is found after an examination of the entire record, that the challenged Instruction could not have effected the outcome of the case. *Bender v. Brumley* at 276-77; *Middleton v. Harris Press and Shear, Inc.*, 796 F.2d 747, 749 (5th Cir. 1986).

Therefore, Russell must satisfy a two-part test. First, Russell must have demonstrated that the Charge as a whole created "substantial and ineradicable doubt whether the Jury has been properly guided in its deliberations." Second, even if the Charge was erroneous, reversal is still not appropriate if the challenged portion of the Charge could not have effected the outcome of the case.

(iii) *The Instant Case*

Any objections made to the Charge must have been brought to the attention of the District Court at trial. *9A Wright & Miller, supra*, Section 2553 (2d ed. 1995) ("In the absence of a properly specific objection under Rule 51 made before the jury retires, a party ordinarily cannot claim on appeal that the trial court erred in the giving of an erroneous instruction or the failure to give a requested instruction."). For the issue to have been properly raised on appeal, Russell must have complied with Rule 51. The parties are not entitled, for example, to have the jury instructed in the precise language or form they request. *Wilson v. Zapata Off-Shore Co.*, 939 F.2d 260, 270 (5th Cir. 1991).

Russell did manage to specifically object to two definitions in the Charge dealing with "good faith" and "undue hardship". Russell made absolutely no mention, however, of the words "with or without reasonable accommodation" appearing in some portions of the Charge, and not in others.

General objections are insufficient to satisfy the requirements of Rule 51. *See, e.g., Bolton v. Tesoro Petroleum Corp.*, 871 F.2d 1266, 1272 (5th Cir. 1989) (finding that the objection: "To the extent any charge requested was not given by the Court" to be insufficient to "inform the Court of [the] perceived problem"); *Tandy Brands, Inc. v. Harper, supra* (finding that appellant's purported objection did not satisfy Rule 51's requirement that a party state distinctly the matter to which he objected and the grounds of his objection, and that it was not sufficiently specific to bring into focus the precise nature of the alleged error, *quoting with approval, Delancey v. Motichek Towing Services, Inc., supra*); *Williams v. Hoyt*, 556 F.2d 1336, 1340 (5th Cir. 1977) (holding that the "sweeping generalization" that the Charge to the jury was "fundamentally wrong" and "not a fair statement of the law" did not require extended discussion by the Court, because the appellant

failed to object to the Court's instruction in accordance with Rule 51). Based on these cases, it is clear that Russell's objection was not specific enough to appraise the District Court of the particular problem with the Instruction now complained about. Russell, therefore, failed to satisfy the requirements of Rule 51.

Russell argues, however, that he should be excused from the requirements of making a specific objection because he allegedly had made his position on the Instruction in question clear to the District Court. *See, e.g., 9A Wright & Miller, supra,* § 2553; and *Pierce v. Ramsey Winch Co.*, 753 F.2d 416 (5th Cir. 1985). In *Pierce*, the Fifth Circuit held that the Defendant adequately preserved his objection when, in addition to making a general objection (which in and of itself was inadequate), he also filed a written memorandum setting forth his position regarding the proposed instruction. *Pierce* at 424. The specific disagreement with the Court's Charge was included in the record, which assured the Fifth Circuit as to the substance of the objection. Therefore, the *Pierce* court held, the purpose of Rule 51 had been served.

In the instant case, however, there was no evidence in the record as to what Russell's position was regarding the omission of the words "with or without reasonable accommodation" from any portion of the Charge. There was never any discussion on that issue with the District Court whatsoever, either on-the-record or in a written memorandum.

Russell claimed, however, that he had made his position known to the Trial Judge in an off-the-record conference. Russell relied on *Niehus v. Liberio*, 973 F.2d 526 (7th Cir. 1992) to argue that an objection need not be stated on-the-record. In *Niehus*, an *uncontradicted* Affidavit was submitted by the appellant's lawyer. The Court ruled that the uncontradicted Affidavit established compliance with Rule 51. Such was not the case here. An Affidavit was submitted to the Fifth Circuit by Russell in an effort to supplement the record, which effort the Fifth Circuit rejected. More

importantly, the Fifth Circuit has never approved any procedure whereby *off-the-record* objections comply with Rule 51. "If the proper objection does not appear in the record, then the appellate court need not consider the alleged error." *Burnes v. Travelers Insurance Co.*, 344 F.2d 70, 73 (5th Cir. 1965). *See, in addition, Dupre v. Fru-Con Engineering, Inc.*, 112 F.3d 329, 334 (8th Cir. 1997) (rejecting the reasoning of *Niehus* and holding that to preserve an argument concerning a jury instruction for appellate review, a party must state distinctly the matter objected to and the grounds for the objection on-the-record); and, *Coy v. Simpson Marine Safety Equipment, Inc.*, 787 F.2d 19, 25 (1st Cir. 1985) (reviewing jury instructions only for plain error when the specific grounds of the objections were not stated on-the-record).

(iv) *Plain Error*

Because of the failure of Russell to comply with Rule 51, the Fifth Circuit limited its review to plain error. *Highlands Insurance Co. v. National Union Fire Insurance Co.*, 27 F.3d 1027, 1031-32 (5th Cir. 1994). For Russell to prevail on a standard of plain error, he must have shown (i) an error; (ii) that the error was plain, clear, or obvious; (iii) that the error effected substantial rights; and (iv) that not correcting the error would seriously effect the fairness, integrity, or public reputation of judicial proceedings. *Highlands Insurance Co.* at 1032, which case quoted with approval from *United States v. Olano*, 507 U.S. 725, 736, 113 S. Ct. 1770, 1778-79, 123 L. Ed. 2d 507 (1993), and held that the principles announced in *Olano* applied equally in the civil context.

In determining whether a particular jury instruction was plainly erroneous, the reviewing court is to review the Charge as a whole. *Turnage v. General Electric Co.*, 953 F.2d 206, 211-212 (5th Cir. 1992); *9A Wright and Miller, supra*, § 2558.

The Instructions specifically admonished the Jury not to single out one Instruction alone as stating the law, and that they must

consider the Instructions as a whole. "Juries are presumed to follow the instructions of the Court." *United States v. Fletcher*, 121 F.3d 187, 197 (5th Cir. 1997) *citing Zafrio v. United States*, 506 U.S. 523, 540-41, 113 S. Ct. 933, 938-39, 122 L. Ed. 2d 317 (1993). There was no indication in the record that the Jury was confused by, or failed to follow, any of the Court's Instructions.

Furthermore, the Fifth Circuit held that even if error was assumed, the stringent requirements of the plain error exception are narrow, and would apply only where the error, if any, was so fundamental as to result in a miscarriage of justice. *Highlands, supra*; *Johnson v. Helmerich & Payne, Inc.*, 892 F.2d 422, 424 (5th Cir. 1990). There are no cases in the Fifth Circuit, or in any other circuit, that hold that any portion of the *Federal Jury Practice & Instructions* used by the District Court (and relied upon by Russell, as well) were erroneous or "clearly erroneous under current law". The Fifth Circuit held that it could not be said that the stringent requirements of the plain error exception were satisfied by the failure to include the words "with or without reasonable accommodation" in a particular paragraph of a twenty-seven page Charge, especially since the phrase was fully explained in later paragraphs and the Instructions admonished the Jury to consider the Instructions as a whole.

(v) *There Is No Split In The Circuit Courts*

Russell relied on *Glover v. The BIC Corporation*, 6 F.3d 1318 (9th Cir. 1992) as allegedly reflecting a split in the Circuit Courts on "Rule 51 objections." In *Glover*, the trial court failed to instruct the jury on causation in a negligence case. The Defendant failed to object. Since under Rule 51 the Defendant waived the error, the Defendant was trying to fall within an exception. The Defendant cited the Ninth Circuit to its "pointless formality" exception to Rule 51, which held that, *inter alia*, in circumstances where (i) the objecting party argued the disputed matter with the Court throughout the trial; and (ii) it was clear, *from the record*, that the

Court knew the grounds asserted by the objecting party, the Court would not require a "futile formal objection." *McGonigle v. Combs*, 968 F.2d 810 (9th Cir.), *cert. dismissed*, 113 S. Ct. 399, 12 L. Ed. 325 (1992). As stated by the Fifth Circuit in *Pierce*, the "purpose of Rule 51" must be served. The objection must be stated clearly, and it must be done in such a way as to be included in the record so the reviewing Court can be assured of Rule 51 compliance.

Thus, the Fifth Circuit in *Pierce* has set forth essentially the same standard for exception to Rule 51, as has the Ninth Circuit in *McGonigle* and *Glover*. The key elements of the exception, regardless of the Circuit, are the same: (i) the objecting party must assert his position to the trial court throughout the trial; and (ii) those assertions must be made on-the-record, so that the reviewing Court knows that Rule 51 was somehow complied with. *Compare, Thorsted v. Kelly*, 858 F.2d 571, 573 (9th Cir. 1988) (the appellate court's inquiry is whether, considering the Charge as a whole, the trial court's instructions fairly and adequately covered the issues presented, correctly stated the law, and were not misleading); *with Bender v. Brumley, supra*; *also compare, United States v. Beltran-Rios*, 878 F.2d 1208, 1214 (9th Cir. 1989) (giving the trial court substantial latitude in tailoring instructions); *with, FDIC v. Wheat, supra*. Russell did not comply with either of these key elements.

Thus, there is no conflict between the decision of the Fifth Circuit in the instant case, and the Ninth Circuit in *Glover*, or with any other Court of Appeals on any provision of Federal law applicable to this case, as required in Rule 10(a) of this Court's Rules. *Braxton v. United States*, 500 U.S. 344, 348, 111 S. Ct. 1854, 1857, 114 L. Ed. 2d 385 (1991).

B. The Instructions and the ADA

The District Court instructed the Jury that the ADA defined a "qualified individual with a disability" as an individual with a disability who can perform the essential functions of the

employment position that such individual holds or desires. 42 U.S.C. § 12111(8).

The District Court instructed the Jury that the term "essential functions" was defined as the fundamental job duties of the employment position the individual with a disability holds, and does not include the marginal functions of the position. Among other reasons, a job function may be considered essential if (i) the reason the position exists is to perform that particular function; (ii) the limited number of employees available to perform the job function; and/or (iii) the function is highly specialized and the incumbent employee is hired for his or her expertise or ability to perform the particular function. 29 C.F.R. § 1630.2(n).

The District Court instructed the Jury that the ability to report to work on a consistent and regular basis was an "essential function". The District Court instructed the Jury that the inability to perform the essential functions, with or without reasonable accommodations, because the employee cannot report to work, precludes a person from being a "qualified individual with a disability" under the ADA.

The District Court defined "reasonable accommodation." The District Court instructed the Jury that employers must make "reasonable accommodation" of the known disabilities of the employee, unless the employer can show that the requested accommodations would impose an "undue hardship". 42 U.S.C. § 12112(b)(5)(A); 42 U.S.C. § 12111(10)(A) and (B). A reasonable accommodation would be one that would "enable the employees with disabilities to enjoy equal benefits and privileges of employment as are enjoyed by employees without disabilities." 29 C.F.R. § 1630.2(o). However, it is the responsibility of the employee with the disability to inform the employer that an accommodation is needed for the employee to perform the essential job functions. The District Court instructed the Jury that an employer is not required to provide an accommodation if unaware

of the need. *EEOC Technical Assistance Manual on the ADA*, Page III-7 (January 1992).

C. Russell's Requested Instructions Were Essentially The Same As Those Given By The Court

The Instructions given to the Jury by the Court were essentially the same as those proffered by Russell. Russell's Instruction No. 12 defined "qualified individual with a disability" as including the words "with or without reasonable accommodation". Russell cited the Court to Section 104A.04 of *Devitt, Blackmar, Wolff and O'Malley*, Federal Jury Practice & Instructions (Supp. 1996). The Instruction contained in that treatise, at that section, is worded as follows:

> The term "qualified individuals with a disability" as used in these Instructions, means an individual with a disability who can perform the essential functions of the employment position which the Plaintiff holds or for which the Plaintiff has applied.

In short, the words "with or without reasonable accommodation" do not appear in the treatise cited to the Court by Russell. Russell added those words. The District Court, however, chose to use the exact wording set forth in the treatise. This makes sense. If an employee cannot report to work on a regular and consistent basis — as was the case with Russell — reasonable accommodations (*i.e.*, any *effective modification or adjustment to the workplace* that makes it possible for a person with a disability to perform *the essential functions* of their employment position) would not matter. They would be irrelevant. This is particularly true in the case of a brain injury. If modern medicine could not get Russell out of his house and into the workplace, certainly it is not the purpose of the ADA to impose such a burden on the employer.

The District Court also instructed the Jury as to the meaning of the phrase "reasonable accommodation", again coming from

the same treatise relied upon by Russell, at Section 104A.09, wherein it was stated:

> The term "reasonable accommodation" as used in these Instructions means, modifications to the workplace which allows a person with a disability to perform the essential functions of the job or allows a person with a disability to enjoy the same benefits and privileges as an employee without a disability. The term "reasonable accommodation" does not include efforts that would cause an undue hardship on the employer.

In fact, references to the phrase "reasonable accommodation" appear in the Court's Charge more than twenty times. Thus, the Court relied on and used the same authority as was cited to the Court by Russell. Error would not be preserved if the objecting party offered "virtually identical instructions" to those submitted by the Court. *Dillon v. Nissan Motor Acceptance Co., supra*; *Federal Crop Ins. Co. v. Hester, supra.*

D. Russell Failed To Properly Object Under Rule 51

Russell did not complain to the District Court that the words "with or without accommodation" were not included at any point in the Charge. Russell did not complain that those words appeared in the Charge in some places and not in others. Russell did not object to the Court's definitions of "reasonable accommodations" or "essential functions." Russell did not complain that the Court defined "essential functions" as including "the ability to work on a *regular and consistent* basis." Russell did not complain about the wording used in the treatise, or assert why the Court should change it. Russell never mentioned any of this to the District Court. The District Court had no way of knowing any of the matters Russell has now raised for the first time on appeal. Second, there was nothing in the record for the reviewing Court to examine on this issue in order to see if the purpose of Rule 51 had been served.

There was no on-the-record discussion, or written memorandum submitted by Russell. Hence, Russell neither complied with Rule 51, nor complied with any of the Rule 51 exceptions. None of the Circuit Courts, under these circumstances, would have held that Russell had preserved error.

E. The Evidence And The Verdict

(i) *Is Russell "Qualified" Under The ADA?*

Russell was not a "qualified individual" because, since the date of the accident in August of 1992, Russell was not able to perform the essential functions of his job. Specifically: (i) Russell's doctors never released Russell to return to work; (ii) Russell's position required Russell to be at the Bank to interact with employees and customers, and to make use of Bank files, none of which Russell was able to do; and finally, (iii) the Bank accommodated three of Russell's four requested accommodations, none of which made any difference whatsoever, and all of which were "failures", because of the serious impairments Russell had suffered.

Russell's claim under the ADA could not be sustained, in the unanimous opinion of the Jury, because Russell could not even get across the initial threshold. The ADA provides protection only to "qualified individuals." 42 U.S.C. § 12112(a). In communications and writings from Russell's treating physicians, it was repeatedly stated as late as April of 1994 — more than twenty months after the accident, and six months after his termination — that Russell could not work. When confronted with these opinions from his own treating physicians, Russell agreed with them. In fact, Russell admitted that the mental impairments described in writing by his treating physicians still existed as of the date of his trial in January of 1996.

(ii) *Russell's Choice: Disability Payments*

Since Russell's own doctors did not think Russell was capable of returning to work — the most essential of "essential functions" of employment — Russell continued to receive disability payments from the Bank's disability insurance carrier. Russell freely made this choice: to remain on disability, and not return to work and risk losing his job and his disability payments. Russell relied on the same medical opinions to recover disability payments from the Bank's disability insurance carrier as he presented to the Jury. Hence, Russell attempted to take two mutually exclusive positions: first, claim total disability to the disability insurance carrier, sending them doctor's report-after-report, letter-after-letter, and test-after-test showing a complete inability to work, in order to receive disability payments of $2,300 per month; and, second, claim to the Jury an ability to work, that was allegedly denied because of disability discrimination. The doctrines of judicial estoppel and simple estoppel would preclude Russell from being a "qualified individual" in these circumstances, and this has been so held by recent rulings. *See, e.g., McNemar v. The Disney Store, Inc.*, 91 F.3d 610 (3rd Cir.), *cert. denied*, 117 S. Ct. 958 (1997); *Johnson v. Hines Nurseries, Inc.*, 950 F. Supp. 175 (N.D. Tex. 1996); *Hatfield v. Quantum Chemical Corp.*, 920 F. Supp. 108 (S.D. Tex. 1996). These cases alone would dictate the take nothing judgment.

The truth caught Russell. The truth as it was described in Russell's medical records. The Jury saw the truth and so found. Any employee not even able to report to work is not a "qualified individual with a disability" under the ADA.

F. The Evidence On "Reasonable Accommodations"

(i) *Russell's Requests Were Not Reasonable*

Russell asked the Bank to allow him to work at home as a "reasonable accommodation." The Bank agreed to try this, and

provided files for Russell to work on at home. This experiment was a complete failure, by Russell's own admission. He had the files for several weeks and did not undertake any activity with respect to those files whatsoever. Furthermore, Russell was aware that his job functions required constant interaction with Bank customers, and Bank employees. He told the Bank to prohibit his secretary from calling him at home. And, on at least one occasion, he asked the Bank to instruct a Bank customer not to call him at home. Russell testified that he could no longer tolerate these types of personal interactions because of the brain injury he suffered in the accident.

> Although the ADA requires an employer to make "reasonable" accommodations for individuals who are qualified to perform the essential functions of their employment, the statute cannot be construed to require an employer to make fundamental or substantial modifications in its operations to insure every disabled individual the benefit of employment.

Reigel v. Kaiser Foundation Health Plan of North Carolina, 859 F. Supp. 963 (E.D.N.C. 1994). Furthermore, any accommodation which would have placed heavier work burdens on Russell's co-workers is not required under the ADA, and that is exactly what Russell's requested accommodations asked for. *Turco v. Hoechst Celanese Corp.*, 101 F.3d 1090 (5th Cir. 1996).

(ii) *Is A Miracle A "Reasonable Accommodation"?*

Finally, and most importantly, the accommodations requested by Russell still would not address his mental limitations. Russell's treating physicians repeatedly so stated. As was noted by Dr. Fulbright in his letter of April 29, 1994 to the Bank's disability insurance carrier:

> I continue to be concerned that Mr. Russell's impaired attention, concentration, information, processing speed,

> memory and reasoning abilities may result in him making some fatal errors on the job which would ultimately cost him the job.

The case law interpreting the ADA has consistently held that the burden was on Russell to provide evidence that a reasonable accommodation would permit performance of the essential functions of the position. *White v. York International Corp.*, 45 F.3d 357, 362 (10th Cir. 1995). Russell offered no evidence whatsoever of any accommodation which would permit him to *miraculously* perform the essential functions of the job he held at the Bank. It stretches credulity too far in this matter to suggest the Bank could have undertaken any accommodation which would have miraculously "empowered" Russell to his pre-accident abilities. Such a notion is contrary to the intended purpose of the ADA, and would impose on employers a burden far beyond what the ADA intended. This is especially true when the employee has affirmatively decided, in consultation with this treating doctors, to not "risk" a return to work.

G. Russell Could Not Even Come To Work

Russell simply was not able to come to work on a regular and consistent basis. Any employee who does not come to work cannot perform any of his job functions, essential or otherwise. Therefore, a regular and consistent level of attendance has always been a necessary element of most jobs, including the one Russell held. The District Court correctly instructed the Jury to that effect. That is clearly the law. *Leatherwood v. Houston Post Co.*, 59 F.3d 533, 537 (5th Cir. 1995) ("Leatherwood has not shown that he could reasonably perform his job duties during any of his manic episodes, . . . Whether it was three (3) months or four (4) months, we agree that Leatherwood's disability-based absence from his job . . . for 33 to 44 percent of his last nine months of employment strongly indicates that . . . his disability rendered him unable to reasonably work in his position as a matter of law."); *Tyndall v.*

National Education Centers, 31 F.3d 209 (4th Cir. 1994). *See also Rogers v. International Marine Terminals, Inc.*, 87 F.3d 755, 759 (5th Cir. 1996) (holding that because the Plaintiff could not attend work, he was not a "qualified individual with a disability" under the ADA); *Carr v. Reno*, 23 F.3d 525, 529-30 (D.C. Cir. 1994) (holding that coming to work regularly was an essential job function); *Vande Zande v. Wisconsin Department of Administration*, 44 F.3d 538, 544 (7th Cir. 1995) ("Most jobs in organizations public or private involve team work under supervision rather than solitary unsupervised work, and team work under supervision generally cannot be performed" unless employee arrives for work); *Law v. United States Postal Service*, 852 F.2d 1278, 1279-80 (Fed. Cir. 1988) (attendance is a minimum function of any job); *Falcoff v. IBM*, 854 F. Supp. 215, 227 (S.D.N.Y. 1994), *aff'd*, 60 F.3d 811 (2d Cir.), *cert. denied*, 116 S. Ct. 522 (1995) ("Some degree of regular, predictable attendance is fundamental to most jobs"); *Wimbley v. Bolger*, 642 F. Supp. 481, 485 (W.D. Tenn. 1986), *aff'd*, 831 F.2d 298 (6th Cir. 1987) (an employee who does not come to work cannot perform any of his job functions, essential or otherwise).

Russell missed fifteen months of work after his accident in August of 1992, and before his termination. After his seizure at the Bank in early September of 1992, Russell never came to work at the Bank again.

H. The Jury's Conclusion

Thus, it was quite easy to understand how the Jury saw this case, and how the Jury so readily came to the conclusion that they did. After hearing all the evidence, viewing the witnesses (including Russell and his doctor), and examining the medical records, this Jury concluded that Russell was not a "qualified individual with a disability," which term had been defined for them as a person who "can perform the essential functions" of the position held or sought. "Essential functions" was defined for them as the "basic,

fundamental duties of the position" held or sought, which included "the ability to work on a regular and consistent basis." Russell did not object to any of these Instructions. Since Russell could not (and did not) come to work, he could not perform his job's "essential functions." Obviously, therefore, he was not a "qualified person" for protection under the ADA. This Jury was not confused and had no difficulty in unanimously concluding Russell was not qualified for ADA protection.

CONCLUSION

The Jury was properly instructed, with clear, well-written instructions which assisted them toward an intelligent understanding of the legal and factual issues involved in this ADA case. Their verdict was consistent with the overwhelming evidence admitted, which came from Russell, Russell's doctors, and from Russell's medical records. Russell's doctors said Russell could not work, and never released him to return to work. The Bank allowed Russell to come back to work in January of 1993, but he failed to report, because, as his doctor's session notes reflect, Russell was concerned he could not perform, and that he would be terminated for performance reasons, thereby losing his disability payments.

There was no "substantial and ineradicable doubt," as the law requires for a reversal. Rather, the Jury's conclusion was consistent with the conclusion previously reached by Russell, Russell's doctors, and the Bank: that Russell was not able, under any set of circumstances, to even report to work, much less perform the essential functions of such an intense job. Thus, the Bank came to the same conclusion about Russell's ability to perform as had Russell's treating physicians. The Jury reached this same conclusion, as well.

Russell sought "inconsistent results" in this case. He claimed "total disability" on multiple occasions, in word and deed. His doctors said it multiple times, as well. He even chose to stay on disability and not risk working. It would have been, therefore, an anomalous end to this case had the Jury found Russell to be a "qualified person" under the

ADA, based on the evidence properly submitted to them. Both judicial estoppel and simple estoppel would compel that Russell take nothing from this suit.

Russell did not properly object to the Court's Charge in a manner required under Rule 51, nor did Russell satisfy the elements of any Rule 51 exceptions. Again, this is not hard to understand. It was not because Russell was not given ample opportunity to do so, or did not know how. It was because this case was about whether Russell could cross the threshold of being "qualified" for ADA protection, *i.e.*, able to perform the essential functions of the job he held or sought, which included, as a matter of law, being able to work on a regular and consistent basis. For fifteen months after his accident, Russell did not come to work, although invited by the Bank to do so.

Lastly, it is clear that there is no split in the Circuit Courts, as Russell has asserted, on any provision of federal law relating to any important matter in this case. The District Court created well-reasoned Instructions relying on established law and the same treatise relied upon by Russell. The Bank believes, therefore, that the Jury, the District Court, and the Fifth Circuit Court of Appeals were all correct in their decisions, and that this case does not merit further review by this Court.

For all of the foregoing reasons, the Bank would respectfully pray that Russell's Petition for Writ of Certiorari be, in all things, denied.

Respectfully submitted,

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